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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

By JOHN L. GRIFFITHS,
OFFICIAL REPORTER.

VOL. 117,
CONTAINING CASES DECIDED AT THE NOVEMBER TERM, 1888,
NOT PUBLISHED IN VOL. 116.

INDIANAPOLIS:
THE BOWEN-MERRILL CO., LAW PUBLISHERS.
1889.

0-8)

Entered according to the Act of Congress, in the year 1889,
By JOHN L. GRIFFITHS,
In the Office of the Librarian of Congress, at Washington, D. C.

Rec. July 17, 1889.

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INDIANAPOLIS ELECTROTYPE
FOUNDRY.

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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. BYRON K. ELLIOTT.*†
HON. JOSEPH A. S. MITCHELL.‡
HON. JOHN G. BERKSHIRE.§
HON. WALTER OLDS.§
HON. SILAS D. COFFEY.§
HON. GEORGE V. HOWK.||
HON. ALLEN ZOLLARS.||
HON. WILLIAM E. NIBLACK.||

* Chief Justice at the November Term, 1888.
† Term of office commenced January 3d, 1887.
‡ Term of office commenced January 6th, 1885.
§ Term of office commenced January 7th, 1889.
|| Term of office expired January 7th, 1889.
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OFFICERS
OF THE
SUPREME COURT.

CLERK,
WILLIAM T. NOBLE.

SHERIFF,
MYRON NORTH.

LIBRARIAN,
CHARLES E. COX.

C A S E S

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1888, IN THE SEVENTY-
THIRD YEAR OF THE STATE.

No. 11,391.

KUNTZ v. SUMPTION, TREASURER.

NOTICE.—*Due Process of Law.—Individual Property Rights.*—A statute conferring upon a tribunal power to finally dispose of the property rights of an individual, and failing to provide for notice, denies to the citizen due process of law, and is unconstitutional.

TAXATION.—*Board of Equalization.—Authority to Change Valuation of Individual Property.—Notice.—Unconstitutional Statute.*—The statute of this State assuming to confer authority upon the county board of equalization to conclusively change the valuation placed upon property by an individual taxpayer and to add property to his list, does not provide for notice, and is unconstitutional.

SAME.—*Notice to Public not Notice to Individual.*—A general notice to the public, by publication or posting, of the time, place and purpose of the meeting of the board of equalization, is not such notice to an individual taxpayer as is required to authorize a change in the valuation of his property.

SAME.—*Unauthorized Notice not Effective.*—The fact that the taxpayer actually has notice of the proceeding is not sufficient to authorize a disposition of his individual property rights, as notice must be given under a statute providing for it, or it will be unavailing.

From the Randolph Circuit Court.

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Kuntz v. Sumption, Treasurer.

I. P. Gray, P. Gray and D. Turpie, for appellant.

W. A. Thompson, J. W. Thompson and L. T. Michener, Attorney General, for appellee.

ELLIOTT, C. J.—The board of equalization of Randolph county entered an order reading thus: "On motion, the board increased the assessment of Peter Kuntz on personal property twenty thousand dollars." Prior to the meeting of the board Kuntz had listed his property for taxation. He was subpœnaed before the board, and testified as a witness, but did so under protest.

We have given to the principal question in this case much and careful study, and we are compelled to hold that the statutory provisions concerning the authority of the county board of equalization to increase the valuation of the property of an individual taxpayer, listed by him for taxation, are unconstitutional. We limit our decision to this point, and mark the limit as distinctly and definitely as we can. We do not affirm that the provisions of the statute conferring authority upon the county board to change the general levy are invalid, nor do we affirm that they are invalid in so far as they confer authority to make orders affecting taxpayers generally. We do, however, affirm that they are invalid in so far as they assume to confer authority upon the board to conclusively change the valuation placed upon property by an individual taxpayer, or to add property to his list. We are satisfied that the statute is in conflict with the Constitution, for the reason that it assumes to confer authority upon the board to add to a citizen's taxes without giving him an opportunity to be heard, and thus denies him due process of law. Our judgment is, that, after a citizen has listed his property, no change in the list can be compulsorily made by an officer or tribunal whose decision is final, until, by due process of law, he has had an opportunity to vindicate the correctness of his list or resist an attempt to increase the valuation. The presumption is that men obey the law, and act in good faith,

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and under this long settled rule it must be held that, until the contrary is shown, the taxpayer is entitled to have his list accepted as correct and just. The contrary can not be legally and conclusively shown unless he has an opportunity to be heard, and this opportunity he can not have unless notice is given him before a conclusive decision is made. The statute does not provide for notice to taxpayers whose taxes it is proposed to increase, and this infirmity destroys it, in so far as it affects such citizens. It is not enough that in fact the taxpayer does have some notice or information, for the law must provide for notice or else no legal notice can be given. A man may be subpœnaed as a witness in an action pending against him, but unless he is summoned or notified as a party, under some law authorizing a summons or a notice, the proceedings are utterly void. A man may be served with a written notice that a petition for a ditch is pending, but if there be no law authorizing notice it will be unavailing. A notice not authorized by law is, in legal contemplation, no notice.

We do not assert that the proceedings would be void where there is some notice, although not given in strict conformity to law, for we know that a defective notice, assumed to be given under a statute, will be sufficient to uphold jurisdiction as against a collateral attack. *Montgomery v. Wasem*, 116 Ind. 343; *Hume v. Conduitt*, 76 Ind. 598.

But there must be an assumption of the right to give notice, and there must be some law authorizing this assumption. At all events, there must be color of right, and without a law authorizing notice there can be none. We approve, as fully as language can do, the doctrine of former decisions, that the Legislature has ample authority to prescribe what the notice shall be. *Johnson v. Lewis*, 115 Ind. 490; *Garvin v. Daussman*, 114 Ind. 429; *Carr v. State, etc.*, 103 Ind. 548; *Hobbs v. Board, etc.*, 103 Ind. 575.

We affirm, too, that whether the notice is by publication or by personal service, it will sustain jurisdiction, provided there is back of it some law providing for notice. While

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affirming these various propositions, we also affirm that where individual property rights are affected there must be provision for notice made by law before there can be a final and conclusive adjudication. Only the law can prescribe the form of the notice, and the law must provide for it. Where, therefore, individual rights are concerned, and the matter is one upon which a party is entitled to be heard, a proceeding conclusively and finally disposing of individual property rights will be void, unless founded upon a law providing for notice of some kind. Where the matter to be decided is one of pure discretion, and the tribunal decides upon its own judgment, unaided by evidence, then notice is not essential. *State, ex rel., v. Johnson*, 105 Ind. 463; *Fries v. Brier*, 111 Ind. 65; *Trimble v. McGee*, 112 Ind. 307; *Weaver v. Templin*, 113 Ind. 298.

But, in adding to property listed by the taxpayer, or in increasing the valuation put upon listed property by him, a board of equalization does not exercise arbitrary power or unrestricted discretion; on the contrary, it must be guided by the law and the facts, and has no right to add to the list of the taxpayer property he does not own; nor has it authority to increase the valuation of property without giving the taxpayer legal notice, thus affording him an opportunity to adduce evidence or furnish information. It is a serious matter to charge a person with fraudulently or falsely listing his property, and to add to his list, or to increase the valuation of property, imposes upon him a burden, for it deprives him of property in the form of money.

That notice is required in all cases where individual property rights are involved, and the matter is not one of pure discretion, has been again and again decided by our own and other courts. *Strosser v. City of Fort Wayne*, 100 Ind. 443; *Troyer v. Dyar*, 102 Ind. 396; *Jackson v. State, etc.*, 103 Ind. 250; *Johnson v. Lewis, supra*; *Board, etc., v. Gruver*, 115 Ind. 224, and cases cited.

That the notice must be authorized by law, is affirmed by many cases. The rule is thus stated in one case: "It is not

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enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing. The law must require notice to them, and give them the right to a hearing and an opportunity to be heard." *Stuart v. Palmer*, 74 N. Y. 183.

Judge Cooley, in speaking of the correction of tax lists, says: "It is a fundamental rule that in judicial or *quasi* judicial proceedings affecting the rights of the citizen, he shall have notice and be given an opportunity to be heard before any judgment, decree, order or demand shall be given and established against him. Tax proceedings are not in the strict sense judicial, but they are *quasi* judicial, and as they have the effect of a judgment, the reasons which require notice of judicial proceedings are always present when the conclusive steps are to be taken." *Cooley Taxation* (2d ed.), 363.

An author who has recently written on the subject concludes his discussion by saying: "There is really but one logical and consistent position in the matter, and that is that a statute that does not provide for notice is invalid." *Lewis Eminent Domain*, section 368.

A very thorough discussion of the question will be found in *Johnson v. Joliet, etc., R. R. Co.*, 23 Ill. 124. We need not, however, look beyond our own reports, for our own decisions declare that the statute itself must provide for notice. *Campbell v. Dwiggins*, 83 Ind. 473; *Jackson v. State, etc.*, 104 Ind. 516; *Fries v. Brier, supra*; *Johnson v. Lewis, supra*.

We said in *Jackson v. State, etc., supra*, that "The notice must assume to be such as the law requires, but, in order to repel a collateral attack, it need not be a valid notice." And in *Garvin v. Dausman, supra*, we said: "It is, without doubt, essential to the validity of every law under which proceedings may be had for the taking of property, or to impose a burden upon it which may result in taking it, that the law make provision for giving some kind of notice at some stage in the proceeding."

The ultimate conclusion which we reach is, that, where a

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conclusive decision is authorized, the statute itself must provide for notice, and secure it to the taxpayer, not as matter of favor, but as a matter of right.

We agree with the appellee's counsel that the board of equalization is not a judicial tribunal, in the strict sense of the term; but while this is true, it is also true that it possesses functions of a judicial nature. *Wilkins v. State*, 113 Ind. 514. Judicial powers are, as we said in the case cited, lodged in the courts, and where the Constitution distributes the judicial power, it can only be exercised by the tribunals named by the Constitution, and constituted as the Constitution provides. *Greenough v. Greenough*, 11 Pa. St. 489; *Chandler v. Nash*, 5 Mich. 409; *Alexander v. Bennett*, 60 N. Y. 204; *Van Slyke v. Trempealeau, etc., Ins. Co.*, 39 Wis. 390 (20 Am. R. 50); *Gibson v. Emerson*, 7 Ark. 172; *Gregory v. State, ex rel.*, 94 Ind. 384; *Shoultz v. McPheeters*, 79 Ind. 373.

But while we hold that the authority of the board of equalization is not judicial, we also hold that it is in its nature so far judicial as to require notice to one whose individual rights are directly affected. We are inclined to concur with appellee's counsel that the judgment of the board is conclusive, but to that proposition we add that it is only so where there is jurisdiction, and that notice to one whose list is to be added to or whose valuation is to be increased is essential to give jurisdiction. *Clinton School District's Appeal*, 56 Pa. St. 315; *Osborn v. Inhabitants of Danvers*, 6 Pick. 98; *Hughes v. Kline*, 30 Pa. St. 227; *Macklot v. City of Davenport*, 17 Iowa, 379; *Deane v. Todd*, 22 Mo. 90; *McIntyre v. Town of White Creek*, 43 Wis. 620.

The fact that the judgment is conclusive supplies a strong reason for holding that the taxpayer should have an opportunity to be heard, and that he should be heard before his list or his valuation is set aside or changed. The power to hear and determine, where there is a question admitting of controversy and the entire matter is not one of absolute and arbitrary discretion, implies that in reason and justice the

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law should, by making provision for notice, give the parties an opportunity to be heard, for otherwise it can not be justly said that there is due process of law.

Thus far we have proceeded upon the assumption that the statute does not provide for notice to the individual taxpayer whose list is to receive additions or whose valuation is to be increased, and if this assumption can not be made good our reasoning is invalid. It is, however, not difficult to prove the validity of our assumption. The statute itself supplies the requisite proof. It does provide notice sufficient for two classes of judgments, but for no others. It provides for notice sufficient as to all general changes in the levy, and sufficient as to all who have complaints to make, and over these matters jurisdiction arises when the notice is given as the statute directs. But there is no provision for notice to the individual taxpayer whose list is to be added to or whose valuation is to be increased. Its provisions on the subject of notice are these: "Two weeks' previous notice of the time, place, and purpose of such meeting shall be given by the county auditor in some newspaper of general circulation, printed and published in the county, or, if no newspaper be published in the county, then by posting up notices in three public places in each township in the county." Section 6397, R. S. 1881. This notice, it is obvious, can not require every taxpayer in the county to be in attendance at the meeting of the board to see that no additions are made to his list. As additions to his list affect him as an individual, he is entitled to notice as an individual. He is not within the scope of the statute, since he is not bound to assume that there will be any change in the verified list given by him to the assessor.

His rights are distinct from those of the public, and from the rights of those persons who have complaints to make. Those who believe themselves wronged by having property listed to them that they do not own, or who believe that their property has been overvalued, are actors; they move, they

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take the initiatory step, and they must come before the board under the notice prescribed by the statute. But with the taxpayer whose assessment is to be increased, it is otherwise; he is not the actor, he does not take the initiatory step, but, on the contrary, he is passive and inactive until brought before the board by notice. He is not under any legal obligation to move until notice comes to him—indeed, he can not move if he is content with his list and assessment—for there is nothing for him to do. The taxpayer who has a complaint to make occupies a position very similar to that of the plaintiff in an ordinary action, while the person whose taxes are to be increased is in a position very like that of a defendant. We must hold that such a taxpayer is entitled to notice, or else we must hold that he is bound, at his peril, to keep vigilant watch of the proceedings lest property he does not own be assessed to him, or the valuation of his listed property be increased. In the absence of notice to him as an individual, he is not bound to exercise any such vigilance. *Claybaugh v. Baltimore, etc., R. W. Co.*, 108 Ind. 262; *Munson v. Blake*, 101 Ind. 78.

It would be almost as unjust to compel such a taxpayer to be constantly on the watch during the meeting of the board as to compel a defendant who has failed to pay a note, violated a covenant, or committed a trespass, to watch the dockets of the court during term-time. The notice does no more than inform the public that the board will be in session at a designated time and place, and no one is bound to act upon the notice farther than to present complaints or resist general changes in the levy; certainly no one is bound to know that a complaint will be preferred against him affecting his individual rights.

If one taxpayer is bound to keep watch during the session of the board, so are all, and the result would be that the meetings of the board would be thronged with taxpayers, or else their rights be at the mercy of the board. The organic law, to which all statutes must yield, does not intend that

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such a thing shall ever occur, for it requires notice to each person whose individual property rights may become the subject of investigation and final adjudication. This is a fundamental principle ruling all the departments of government. A decision of a judicial nature, conclusively deciding upon the individual property rights of a citizen, and imposing a burden upon him, can only be given in a proceeding of which, before a final and conclusive judgment is reached, the citizen has notice, for without such notice there can not be due process of law. A decision not final, but subject to review, may not necessarily require notice, but a final decision must be based on a notice provided for by law.

Judgment reversed, with instructions to overrule the demurrer to the complaint.

Filed Jan. 22, 1889.

No. 13,506.

COOK v. WALLING.

MARRIED WOMAN.—Mortgage.—Invalid Unless Lawful Husband Joins.—Estoppel.—Where a woman, whose husband has been absent and not heard of for more than seven years, assumes that he is dead and marries another man, and while cohabiting with the latter, and claiming him to be her husband, executes a mortgage upon her separate real estate, in which he joins, she may, upon the subsequent return of her lawful husband, and the resumption of marital relations with him, defeat the mortgage by a plea that he did not join therein as required by law, there being no ground for the application of the doctrine of estoppel.

SAME.—Estoppel Under Act of 1881.—Prior Contract.—The statute of 1881 providing that married women shall be bound by an estoppel *in pais*, has no application to prior contracts.

From the Floyd Circuit Court.

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J. V. Kelso, for appellant.

A. Dowling and J. H. Stotsenburg, for appellee.

MITCHELL, J.—The question for decision arises upon the following facts, which are admitted by the pleadings: In December, 1855, the appellee, Mary C. Walling, became the lawful wife of Creed A. Walling, who, after living with her until some time in the year 1860, went to parts unknown and was not again heard of until the year 1876, a period of some sixteen years. After Walling had been thus absent for more than seven years, acting under the supposition that he was dead, the appellee married Alexander E. Hughes, and removed from a foreign State with him, where they had theretofore resided, to Floyd county, Indiana. She purchased a tract of land in the above named county, which was conveyed to her by the name of Mary C. Hughes. In 1875, the appellee, by the name of Mary C. Hughes, joined with her supposed husband, Alexander E. Hughes, in mortgaging the real estate so purchased and owned by her, to secure a debt due from Hughes to the appellant, Kate C. Cook. The appellee lived and cohabited with Hughes, and claimed him as her husband, and claimed and was reputed to be his lawful wife, during all the time they lived in Indiana, until the year 1876, when Walling returned and made the fact known that he was still in life, whereupon the appellee obtained a divorce from Hughes, and resumed and has ever since continued marital relations with Walling.

The question is, whether or not in a suit to foreclose the mortgage given as above, the facts hereinbefore recited are sufficient to avoid a special plea by Mary C. Walling, in which she alleged that the lands described in the mortgage were her separate estate, and that at the time of the execution of the mortgage, she was and ever since had been the wife of Creed A. Walling, and that he did not join in the execution of the mortgage.

A statute touching the marriage relation, in force at the

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time the mortgage was executed, as well as that now in force, declares that a married woman shall have no power to encumber or convey her real estate, except by deed in which her husband shall join. 1 R. S. 1876, 550 (section 5117, R. S. 1881).

It being conceded by the record that the appellee was, at the time she executed the mortgage, the lawful wife of Creed A. Walling, and that he did not join therein, it follows inevitably that the mortgage was a nullity. The power of a married woman to convey or encumber her separate real estate is wholly statutory, and any deed or other instrument purporting to convey or encumber her land, in which her husband has not joined, is absolutely void because of the want of power or capacity on her part to execute such an instrument without being joined therein by her husband. As has been said, "The instrument has the form and semblance of a deed, and nothing more." *Lowell v. Daniels*, 2 Gray, 161 (61 Am. Dec. 448). It is without legal force and of itself creates no equity which the courts can recognize or protect. *Otis v. Gregory*, 111 Ind. 504, and cases cited.

Tacitly conceding the invalidity of the instrument, it is, nevertheless, contended with much plausibility, that, because the appellee was living and cohabiting with Hughes, and because the latter, assuming to be her husband, joined in the execution of the mortgage, she ought now to be estopped from asserting that her husband did not join therein.

An estoppel *in pais* has for its foundation the proposition that a person *sui juris* has, by misrepresenting the truth, purposely induced another to believe in, and act upon, the existence of certain facts, which, if they were now made to appear different from what they were represented to be, would cause substantial injury to the person who acted on the faith of the representation. When, therefore, a married woman deals, or assumes to deal, in respect to a matter concerning which her common law disabilities have been removed, she will be bound by an estoppel *in pais*, as any other person, and

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in case she makes affirmative representations concerning the character in which she proposes to contract—whether for the benefit of herself or of some third person—and thereby induces another, who acts in good faith, to contract with her, supposing the contract to be of the character represented, she will be estopped to deny the representations, in case she would have been *sui juris*, in respect to the contract, had the facts been as represented. *Orr v. White*, 106 Ind. 341; *Rogers v. Union Cent. L. Ins. Co.*, 111 Ind. 343; *Lane v. Schlemmer*, 114 Ind. 296; *Bodine v. Killeen*, 53 N. Y. 93.

Where, however, the contract relates to a matter concerning which all the common law disabilities continue, so that the contract is utterly void for want of power or capacity to make it, the doctrine of estoppel can not be invoked in order to remove the incapacity. In other words, while a married woman may be estopped by affirmative representations concerning the character of a contract, which, if her representations be true, she is, notwithstanding her coverture, under no legal disability to make, she can not, by her own act or representation, remove her legal incapacity to make a contract, which coverture alone, under any and all circumstances, disqualifies her from making, except in a prescribed way. *Carpenter v. Carpenter*, 45 Ind. 142; *Levering v. Shockey*, 100 Ind. 558; *Bank of America v. Banks*, 101 U. S. 240; *Sims v. Everhardt*, 102 U. S. 300; *Keen v. Coleman*, 39 Pa. St. 299 (80 Am. Dec. 524); *Klein v. Caldwell*, 91 Pa. St. 140; *Morrison v. Wilson*, 13 Cal. 494 (73 Am. Dec. 593); *Todd v. Pittsburgh, etc., R. R. Co.*, 19 Ohio St. 514.

The statute, as well as the common law, deprives a married woman of all power to convey or encumber her separate real estate, except by deed in which her husband shall join. Without the joinder of the person who occupies toward her the legal relation of husband, the impediment in the way of a deed by a married woman is an absolute incapacity to contract, and this legal incapacity is not cured nor removed because some person other than her husband has joined in the

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deed, even though she may be at the time cohabiting with such person in the honest belief that he is her husband.

It would present a contradiction in terms to hold that an abortive attempt by a married woman to make a deed, which she had no legal capacity to make, should remove her incapacity by the application of the doctrine of estoppel. *Behler v. Weyburn*, 59 Ind. 143.

Desertion or continued and unheard of absence may constitute a ground of divorce, and in case a husband shall have absented himself from his usual place of residence, and gone to parts unknown for a given period, the court having probate jurisdiction may appoint an administrator, after which appointment, the wife of the departed person shall have all the rights and independent powers of a *feme sole*, and may contract and execute deeds for herself. Sections 2232, 2234, R. S. 1881. But a married woman who has been deserted can not lawfully contract a second marriage, during the lifetime of her husband, without obtaining a divorce, nor can she alien or encumber her real estate in his absence, except by pursuing the course indicated by the statute. *Rhea v. Rhenner*, 1 Pet. 105; *Beckman v. Stanley*, 8 Nev. 257; *Harrison v. Brown*, 16 Cal. 287.

The appellee's second marriage was a nullity, because her husband was alive at the time, and for the same reason her deed was void, although joined in by a person supposed to be her husband, but who in fact was not.

Whether or not the conclusions above stated would be in any way modified had the mortgage in suit been executed since the statute of 1881, touching estoppels *in pais*, affecting married women, came in force, we need not now inquire. It is enough to say the statute referred to has no application to the contract in question.

The judgment is affirmed, with costs.

Filed Jan. 22, 1889.

 Plunkett *et al.* v. Black.

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No. 9,342.

PLUNKETT ET AL. v. BLACK.

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PLEADING.—*Written Instrument.*—*Exhibit.*—*Practice.*—A written instrument which is filed with a complaint, but is not the foundation of the action, is not a part of the pleading and will not be considered in aid of it.

JUDGMENT.—*Annulment.*—*Injunction.*—*Compromise.*—*Contract.*—*Consideration.*—A complaint to annul a judgment and enjoin a levy thereunder, alleging that the parties to the judgment had entered into an agreement compromising the matters in difference between them and stipulating that a new trial should be granted the plaintiff and a judgment rendered in his favor, and alleging further that the plaintiff had performed the contract on his part, but not stating the contract more fully or averring a consideration, is bad.

SAME.—*Breach of Contract to Release.*—*Damages.*—An executory contract for the release of a judgment is not effective until its conditions have been performed; but a failure of the judgment holder to comply with the contract makes him liable in damages to the judgment debtor, if the latter has performed on his part.

JURISDICTION.—*Injunction.*—*Process of Another Court.*—*Annulment of Judgment.*—The circuit court of one county has no jurisdiction of an action by a judgment debtor to annul a judgment rendered by the circuit court of another county, or to enjoin the levy of an execution issued thereon.

From the Montgomery Circuit Court.

G. W. Paul, J. E. Humphries and W. M. Reeves, for appellants.

P. S. Kennedy, W. T. Brush, B. W. Hanna and F. T. Hord, for appellee.

BERKSHIRE, J.—The record in this case was filed in this court on the 29th day of March, 1881, and a judgment reversing the cause entered on the 28th day of October, 1882.

On the 14th day of December, 1882, the appellants filed their petition for a rehearing, and, on the 20th day of April, 1883, a rehearing was granted, since which time further consideration has not been given to the case.

The errors assigned are six in number, but the conclusion

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to which we have come will only require a discussion of the first three of them.

The first is that the court erred in overruling the separate demurrer of the appellant Plunkett to the complaint.

The second is that the court erred in overruling the separate demurrer of the appellant Krug to the complaint.

The third is that the court erred in overruling the joint demurrer of the appellants to the complaint.

The cause of demurrer assigned in the separate demurrers is, that the complaint does not state facts sufficient to constitute a cause of action.

The cause of demurrer assigned in the joint demurrer is, that the court did not have jurisdiction of the subject-matter of the action.

The action was commenced, tried, and judgment rendered in the Montgomery Circuit Court.

The facts as stated in the complaint are, in substance, as follows: In the month of December, 1879, the appellant Plunkett recovered a judgment in the Parke Circuit Court against the appellee for the sum of \$2,500; subsequently the appellee filed a complaint for a new trial, after which Plunkett, through his attorneys and agents, Thompson & Thompson, entered into an agreement of compromise of said case, and all matters in difference between them, by which the said Plunkett agreed with the appellee that a new trial should be granted, and that the record of the court should show a trial by the court, and finding and judgment for the defendant; that a copy of the agreement is filed with the complaint as exhibit A; that the appellee has complied with the agreement fully on his part; that Plunkett has caused an execution to issue on the judgment, and the same is in the hands of the sheriff of Montgomery county, who is threatening to levy upon and sell the property of the appellee.

Then follows the prayer for relief, which is that the judgment be annulled and satisfied, and for general relief.

The written agreement, which is referred to in the com-

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plaint, and a copy of which is filed with it as exhibit A, is not, in a legal sense, the foundation of the action, and is not, therefore, within section 362, R. S. 1881.

The appellee did not count on the agreement, and ask to recover thereon. The gravamen of the action is to annul a judgment and enjoin the sheriff of Montgomery county from levying an execution issued thereon upon the property of the judgment debtor.

The exhibit is not a part of the pleading, and can not be considered in aid of it. *Black v. Richards*, 95 Ind. 184; *Johnson v. Moore*, 112 Ind. 91; *Hight v. Taylor*, 97 Ind. 392.

That a judgment may be annulled, or collection thereof enjoined, where its obtainment is tainted with fraud, is no longer an open question. And no one will question the correctness of the position that when a judgment is once released, annulled or cancelled, it thereafter has no vitality, and that an execution issued thereon is a mere nullity, and that a levy and sale of property by its command will be enjoined.

Counsel for the appellee contend in support of the complaint that the facts pleaded had the effect to release the appellee from liability upon the judgment. We are not of this opinion.

The terms of the agreement and the obligations of the parties thereunder are not stated in the complaint. It is stated that, by the agreement, the parties compromised all matters in difference; that a new trial was to be granted and a finding and judgment entered for the appellee. What the matters in difference were, other than had been disposed of by the trial of the case, we are not informed; there may have been nothing else.

It is alleged that the appellee fully performed his part of the agreement, but what that was is not disclosed by the complaint.

It is averred that the appellee had a complaint pending for a new trial; what was to become of it or what has been

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done with it, the complaint does not state. The facts averred come far short of what would be required to work a release or discharge of an ordinary chose in action, and much more so where the obligation is of the highest order, evidenced by the judgment of a court of record. But had the agreement which it is averred the parties entered into operated to release and discharge the judgment, if bottomed on a sufficient consideration, so far as we know it was an agreement without consideration.

There should have been such a description of the contract in the complaint as to make known its character, and whether or not it imported a consideration, and if not, a consideration should have been averred.

It not appearing that the contract was one importing a consideration, and none being averred, the complaint is bad for that reason. *Brush v. Raney*, 34 Ind. 416; *Leach v. Rhodes*, 49 Ind. 291; *Nichols v. Nowling*, 82 Ind. 488; *Higham v. Harris*, 108 Ind. 246.

We are of the further opinion that the contract was executory. *Bruce v. Smith*, 44 Ind. 1; *Farrington v. Tennessee*, 95 U. S. 679, see p. 683. If an executory contract, until executed the judgment continued in full force.

The contract could only become an executed contract when all of the obligations resting upon the parties thereto had been performed.

A failure of either party to perform its conditions on his part would be a breach of the contract, for which, like any other executory contract, he could be held to respond in damages. If Plunkett, after a performance on the part of the appellee, refused to allow the Parke Circuit Court to grant a new trial and render judgment for the defendant, this broke the contract on his part, and the appellee had his right of action because of the breach. And, unless because of the fact that the contract could not be fully executed without the con-

Plunkett *et al.* v. Black.

sent of the Parke Circuit Court, it is probable that specific performance could have been enforced.

The last question we care to consider is, had the Montgomery Circuit Court jurisdiction of the subject-matter of the action? Our conclusion is that it had not.

The prayer for relief in the appellee's complaint was that the judgment of the Parke Circuit Court be annulled and the levy of the execution issued thereon enjoined.

The Parke Circuit Court was a court of equal jurisdiction to that of the Montgomery Circuit Court. The execution, the service of which the appellee sought to enjoin, was the process of that court. The rule is settled in this State, that one court can not control the execution of the orders and process of another court of equal jurisdiction. *Indiana, etc., R. R. Co. v. Williams*, 22 Ind. 198; *Gregory v. Perdue*, 29 Ind. 66; *Coleman v. Barnes*, 33 Ind. 93; *Wiley v. Pavey*, 61 Ind. 457.

It is claimed that the case of *Davis v. Clark*, 26 Ind. 424, lays down a different rule, but we are not of that opinion. There the complaint was filed in the circuit court, a court of general jurisdiction, and having almost exclusive jurisdiction in cases involving the title to real estate. Nor was it sought in that case to enjoin the execution of a judgment in the common pleas court, nor to enjoin the execution of final process issued thereon. The action was simply to enjoin the sheriff from selling the plaintiff's lands under an execution against another party, to which it was claimed they were not subject, and to prevent a cloud from being cast upon the plaintiff's title.

Here it is sought to annul the judgment of the appellant Plunkett, and to enjoin perpetually the execution of final process issued thereon, and the action is brought by the judgment debtor.

The judgment rendered in this case does not, in terms, annul and set aside the judgment of the Parke Circuit Court, but that is its legal effect.

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The sheriff of Montgomery county is perpetually enjoined from levying the execution issued upon it, and the costs of the action are adjudged against the appellants.

The case rests wholly and entirely upon the theory that the agreement referred to in the complaint annulled and cancelled the judgment of the Parke Circuit Court. The sole question involved is as to the right of Plunkett to enforce that judgment.

The judgment is reversed, with costs.

Filed Jan. 22, 1889.

No. 13,166.

AMOS ET AL. v. AMOS ET AL.

DEED.—Construction of.—Vesting of Remainder.—Where a deed conveys land to A. for life, "and at his death to his children begotten by him in wedlock the fee simple," and, in the event of the said A. dying without children begotten in wedlock, then the fee simple to others, the birth of a child to A. in wedlock, and not its survival of the father, is the contingency upon which the remainder vests; otherwise the limitation would be void under sections 2962 and 2963, R. S. 1881.

SAME.—Reference to Contemporaneous Will.—Instruments Construed Together.—

Where a deed refers to an instrument in the form of a will, executed by the grantor contemporaneously with the deed and as a part of the same transaction, and directs that it shall be construed in the light of the provisions of the will, the latter instrument, although the testator is alive and the instrument is not effective as a will, must be considered in construing the deed, and the grantee and all claiming through him are chargeable with knowledge of the provisions of the deed and will.

From the Rush Circuit Court.

117	19
119	530
117	19
129	64
129	90
117	19
181	208
117	19
137	418
117	19
143	280
117	19
146	229
117	19
180	469
158	496
117	19
171	384

Amos et al. v. Amos et al.

B. L. Smith, W. J. Henley, R. Hill and F. Winter, for appellants.

J. Q. Thomas, J. J. Spann, G. C. Clark, D. S. Morgan, J. A. New and E. W. Felt, for appellees.

ELLIOTT, C. J.—On the 2d day of August, 1877, Joseph J. Amos, Sr., and his wife executed a deed to Liford K. Amos, which, omitting some of the formal parts and the description of the land, reads thus: "This indenture witnesseth that Joseph J. Amos and Emily H. Amos, his wife, of Rush county and State of Indiana, convey and warrant to Liford K. Amos during the term of his natural life, and at his death to his children begotten by him in wedlock the fee simple title to the real estate herein described, and in the event of the said Liford K. Amos dying without children begotten in wedlock, then the fee simple to said real estate is conveyed to my grandchildren living at the time of the said Liford K.'s death, and the children of such of my grandchildren as may die after the death of said Liford K., if any there should be, such children to take such interest in said real estate as their father or mother would have been entitled to if living." The deed also contains these provisions: "This deed is made in consideration of love and affection and in consonance with my last will and testament bearing even date herewith, and for the purpose of effectuating and carrying out the intention therein expressed, and should the court having probate jurisdiction have occasion to construe this deed, it shall be done in the light of the several clauses and provisions of said will."

At the time the deed was executed, Joseph J. Amos executed similar deeds to Mezzina J. Amos, Joseph J. Amos, Jr., Willard K. Amos, Joseph J. Caldwell and Claudine Caldwell, all of whom were the brothers and sisters of Liford K. Amos. Under the deed executed to him Liford took possession of the land. The grantor in that deed, as part of the transaction in which it and the similar deeds were exe-

*before?
otherwise the
gift is null and void*

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cuted, caused to be drafted an instrument in form a will, wherein were written provisions respecting the disposition of his property after death, and also this provision: "I hereby devise and bequeath to my grandson, Liford K. Amos, during his natural life, and at his death to his children begotten by him the fee simple title to the land, and in the event of the said Liford K. dying without issue begotten by him in wedlock, then the fee simple title shall go to my grandchildren then living at the time of said Liford K.'s death, and the children of such grandchildren as may die after this date and prior to the death of Liford K., if any there should be, such children to take such interest in said real estate as their father or mother would have been entitled to if living." This instrument refers to the deeds executed by Joseph J. Amos, Sr., to his grandchildren, and declares that they shall be delivered after his death and become absolute immediately. There is in the instrument the further declaration that the property mentioned in it and in the deeds shall vest in such persons only as are of the blood of the author of the instrument.

*This is
what the
deed meant*

Liford K. Amos continued in possession of the land until his death, which occurred in April, 1884. He left no children but left a widow. A child was born to him and his wife during his lifetime. His grandfather, Joseph J. Amos, Sr., is still living and is one of the appellees.

The instrument written at the time of the execution of the deeds is, of course, not effective as a will, since a will is voiceless and powerless during the lifetime of its author. But, while the instrument is not a will, it is, nevertheless, not to be disregarded in the work of construing the deed. The general rule is, that contemporaneous written instruments are to be taken as forming one contract. Possibly there might be some doubt as to whether this rule could apply where one of the instruments was inoperative for the purpose for which it was intended, and there was no reference in the principal and effective instrument to the collateral one;

but, however this may be, the rule must apply where, as here, there is a direct reference to the collateral instrument, accompanied by a positive direction that it shall be taken in connection with the principal instrument.

An old rule of the law is, that "Words to which reference is made in an instrument have the same effect and operation as if they were inserted in the clause referring to them." Broom Leg. Max. 673. It is obvious, therefore, that the instrument drafted as a will must, notwithstanding its lack of life as a will, be taken in connection with the deeds. The rights of the parties, consequently, depend upon the effect to be ascribed to both instruments considered together.

Liford K. Amos was, of course, bound to know the contents and legal effect of the instruments which gave him title. He and his heirs are chargeable with knowledge of the provisions of the deed, and of the will which entered into the deed by means of the reference made to it by the deed. So, too, were all those who claimed title through him bound to know the legal effect of the deed, considered in connection with the instrument purporting to be a will. They had, therefore, notice of the consideration, the character and the effect of the deed, with all its incidents.

The central question is, what is the contingency designated in the deed as that upon which the remainder shall take effect? Is it simply the birth of a child to Liford K. Amos, or is it the birth of a child and its survival? The appellees say: "We maintain that the deed executed by Joseph J. Amos, Sr., on the 24th day of April, 1882, conveyed to Liford K. Amos a life estate in the land therein and a remainder in fee to such child or children as might be born unto him in wedlock after that date." If the assumption contained in this proposition is valid, then the conclusion that counsel deduce from it necessarily follows; but the difficulty is in maintaining the assertion that the birth of a child vested the remainder. A vested remainder can not be divested, but no remainder is vested until the happening of

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the contingency provided for in the deed by which the remainder was created; the question, therefore, is not as to the effect of the remainder, but as to the contingency upon which it is to take effect.

Neither the deed nor the instrument incorporated into it by way of reference, in express terms provides that the remainder shall take effect only in the event that Liford K. Amos shall have a child or children living at the time of his death. On the contrary, the words, taken in themselves and apart from any arbitrary rule of construction, imply that if a child is begotten in wedlock the remainder shall take effect. The words of the deed are, that the grantors convey and warrant "to Liford K. Amos during his natural life, and at his death to his children begotten by him in wedlock, and in the event of the said Liford K. Amos' dying without children begotten in wedlock, then the fee simple is conveyed to my grandchildren;" and the words of the other instrument are, "I hereby devise and bequeath to my grandson, Liford K. Amos, and at his death to his children begotten, the fee simple title to the land, and in the event of said Liford K. dying without issue begotten by him in wedlock, then the fee simple title shall go to my grandchildren." It thus appears that the event fixed by the grantor on which the remainder shall take effect is the birth of a child or children, born in wedlock. It is not declared that the child or children shall survive him, but that the child or children shall be begotten in wedlock, implying that a child or children shall be born to him and his wife. Our judgment is that the remainder vested the instant a child was born to Liford K. Amos in lawful wedlock. The birth of a child is the contingency which vested the remainder. The Supreme Court of the United States, in an opinion written by one of the ablest judges that ever held a place in that great tribunal, quoted from Chancellor Kent the following language: "A. devises to B. for life, remainder to his children, but if he dies without leaving children remainder over, both the remain-

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ders are contingent, but if B. afterward marries and has a child, the remainder becomes vested in that child, subject to open and let in unborn children, and the remainders over are gone forever. The remainder becomes a vested remainder in fee in the child as soon as the child is born, and does not wait for the parent's death, and if the child dies in the lifetime of the parent, the vested estate in remainder descends to his heirs.' We have quoted this language," continues the court, "because of its appositeness to the case under consideration. The propositions stated are fully sustained by the authorities referred to. Other authorities, too numerous to be named, to the same effect, might be cited." *Doe v. Considine*, 6 Wall. 458.

Mr. Tiedeman says: "Thus, in a devise to A. for life, and at her death to her children, the remainder would be vested in the children who are *in esse* at the testator's death, and it will open to let in children born afterwards during the life of A., or during the continuance of her estate." Tiedeman Real Prop., section 402.

Professor Washburn states the rule in similar language: "Thus, upon the grant of an estate to A., with remainder to his children, he having none at the time, the remainder will, of course, be a contingent one; but the moment he has a child born, the remainder becomes as fully vested as if it had originally been limited to a living child." 2 Washb. Real Prop., * p. 233.

Our conclusion that the remainder vested as soon as a child was born to Liford K. Amos in wedlock, is, as we believe, sustained by the authorities, and it is certainly in harmony with the fundamental doctrine that the law favors the vesting of remainders, and will, whenever possible, adjudge that they vest at the earliest possible moment.

In *Doe v. Considine*, *supra*, it was said: "The law will not construe a limitation in a will into an executory devise when it can take effect as a remainder, nor a remainder to be contingent when it can be taken to be vested. It is a rule of law that estates shall be held to vest at the earliest possi-

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ble period, unless there be a clear manifestation of the intention of the testator to the contrary." Our own cases and our statute favor the conclusion we have reached. *Rumsey v. Durham*, 5 Ind. 71; *Wilson v. Rudd*, 19 Ind. 101; *Allen v. Mayfield*, 20 Ind. 293; *Ballenger v. Drook*, 101 Ind. 172.

The provisions of sections 2962 and 2963, R. S. 1881, require us to hold that the remainder vested as soon as the child upon whom the remainder was limited was born, or else to declare the limitation entirely void; but this we ought not to do if we can avoid it, since the rule is to give effect to instruments rather than to destroy them, and we find no great difficulty in giving effect to the deed.

The deed is the instrument of power. The will, as it is called, is of itself totally without force. Its only force is as a component part of the deed. The courts may look to it as a part of the deed to aid them in construing that instrument, but they can not give effect to it as a will. It is the deed, and the deed alone, that conveys the title and creates the estates for life and in remainder. This fact renders inapplicable the authorities cited by the appellants. A deed is effective from the instant of its delivery, but a will does not speak until the testator's death. It is perfectly clear that cases giving construction to wills can not apply with controlling force to deeds, for the instant the deed is delivered it has full force and vigor, while a will has not a spark of life until the death of its author; so that references to living children in a will necessarily mean, in the absence of counter-vailing provisions, children living at the time of the testator's death. What was the situation of the parties at the time of a testator's death is, in general, the material inquiry; but in the case of a deed the material inquiry is as to the condition of things and the situation of the parties at the time the deed was delivered. In this instance the life in being was that of Liford K. Amos, and the person or persons, in other words, the class upon whom the remainder in fee was limited, was the issue of Liford K. Amos, begotten in wedlock. The re-

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mainder is granted to children born to him, and the vesting of the remainder does not depend upon their outliving their father.

The complaint of the appellants avers that Liford K. Amos accepted the deed and entered into possession under it, so that there can be no question as to the delivery of the deed in the lifetime of the grantor. From the time of its delivery it became effective.

We need not decide whether the court properly decided the question of the rights of the appellees between themselves, for, if the appellants have not the title specifically pleaded and relied upon, they can not maintain this action to quiet title.

Judgment affirmed.

Filed Jan. 23, 1889.

117	26
120	339
117	26
124	189
117	26
129	84
117	26
146	582

No. 13,026.

MCKINNEY ET AL. v. THE STATE, EX REL. NIXON.

APPEAL.—*Judgment of Supreme Court.*—*Second Appeal.*—Questions which were open to dispute, and which were either expressly or by necessary implication decided on the first appeal of a cause, are not open for review on a second appeal.

SAME.—*Reversal of Cause.*—*Docketing in Trial Court.*—*Presumption.*—Where an opinion of the Supreme Court reversing a judgment of the trial court is filed in the latter court during term-time, the case stands continued by force of section 660, R. S. 1881, until the next term, and, in the absence of a showing to the contrary, it will be presumed that it was regularly docketed and stood for trial at that term.

SAME.—*Pleading.*—*Right to File in Reversed Cause.*—Where a defendant stands by an answer to which a demurrer has been sustained, and appeals to the Supreme Court, where the ruling of the trial court on the

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answer is sustained, but the judgment is reversed for error in the assessment of damages merely, and a reassessment is ordered, he is not entitled, when the cause is again docketed in the trial court, to file an answer denying the allegations of the complaint, without a showing as in other cases of default.

SAME.—*Judgment for More than Demand.*—*Amendment.*—If judgment is given for a sum larger than that demanded in the complaint, the injured party must ask the trial court to correct it, and if he fails to do so, the complaint will be treated on appeal as having been amended.

NEW TRIAL.—*Excessive Damages.*—*Practice.*—An assignment as a cause for a new trial that the damages are excessive, does not call in question the amount of the recovery in an action on contract, that assignment being applicable only in cases of tort.

From the Clinton Circuit Court.

J. N. Sims, for appellants.

S. H. Doyal and *P. W. Gard*, for appellee.

MITCHELL, J.—Nixon, as one of the drainage commissioners of Clinton county, brought suit against McKinney and others to enforce payment of assessments made against certain real estate owned by the defendants.

The complaint was held sufficient upon demurrer, and this ruling was affirmed on a former appeal to this court. *McKinney v. State, etc.*, 101 Ind. 355. As will be seen by recurring to the facts as stated in the opinion rendered when the case was here before, a demurrer was sustained to the answer, and the appellants refusing to plead further, the damages were assessed as upon a default. The judgment was reversed because the damages assessed were, in the absence of any proof showing the amount of the assessments, excessive. The judgment was accordingly set aside, and the cause remanded with an order that the damages be reassessed.

The complaint has not been changed in any particular, and we must, therefore, decline to enter upon an examination of the questions discussed by counsel which relate to and challenge the sufficiency of the facts to constitute a cause of action. The decision rendered upon the former appeal must be accepted as conclusive upon those questions.

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In order that there may be an end to litigation, questions which were open to dispute, and were either expressly or by necessary implication decided on the first appeal of a cause, will not be open for review on a second appeal, upon which only so much of the proceedings as are found to have taken place after the order remanding the cause will be considered. What precedes the mandate will be regarded as finally disposed of, and no longer the subject of debate in any of the subsequent stages of the case. *City of Logansport v. Humphrey*, 106 Ind. 146; *Forgerson v. Smith*, 104 Ind. 246, and cases cited; *Hawley v. Smith*, 45 Ind. 183; *Willson v. Binford*, 81 Ind. 588; *Test v. Larsh*, 76 Ind. 452.

The opinion rendered by this court on the first appeal was certified to the court below on the 23d day of June, 1885, the June term of the Clinton Circuit Court being then in session. The next term of the court commenced on the first Monday of September following.

The record shows that, on the 26th day of October, 1885, that being the forty-third juridical day of the September term of the Clinton Circuit Court, the opinion having been filed in the office of the clerk of the Clinton Circuit Court on the 25th day of June, 1885, it was ordered spread of record by the court below. At the succeeding November term the defendants entered a special appearance, and moved to dismiss the cause, on the ground that it had been discontinued. This motion was overruled. The appellants insist that the court below lost jurisdiction of the case, because, as they allege, it was not docketed for trial at the September term, that being the next term after the cause was remanded.

When a cause is reversed and sent back for further proceedings, if the opinion shall have been deposited with the clerk of the lower court ten days or more before the first day of any regular term, the cause stands for trial at such term, otherwise it must be continued until the next term. Section 660, R. S. 1881. As we have seen, the opinion was filed during the June term of the Clinton Circuit Court. The

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case was necessarily continued, by force of the statute above cited, until the next term. We must presume that it was regularly docketed, and that it stood for trial at the ensuing September term. The record affirmatively shows that the case was on the docket at that term, and that a motion was made to spread the opinion of record. There was, therefore, no error in overruling the motion to dismiss the cause.

The court afterwards refused to grant leave to the appellants to file an answer denying the allegations of the complaint. In this the court ruled correctly. A demurrer had been sustained to the answer filed by the appellants prior to the first appeal. Without asking leave to amend, they stood by the record and appealed to this court, securing a reversal of the judgment and an order for the reassessment of the damages. Having chosen to abide by the rulings on the demurrers to the pleadings, and to take the chance of reversing those rulings by an appeal to this court, it was too late to ask leave to file additional or amended answers after an adverse decision in that respect, and an order remanding the cause for a reassessment of damages merely.

Judgment was rendered in the first instance as upon a default, the defendants' answer having gone out upon demurrer. The judgment was reversed for error occurring in the assessment of damages. When the case came back to the lower court it stood for a reassessment of damages as upon a default. It was not error to refuse permission to file an answer without a showing as in other cases of default.

It is alleged in the complaint that fifty dollars would be a reasonable fee for the services of plaintiff's attorney in collecting the assessments sued for. The court, upon evidence which fully justified it, allowed seventy-five dollars as attorney's fees. It is now insisted that the court erred in overruling the appellants' motion for a new trial, which assigned, among other causes, that the damages were excessive. This conclusion, it is said, is inevitable, because the amount allowed is in excess of the sum claimed in the complaint. It will be

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observed, there was no objection to the amount of the recovery, nor did the defendants move the court to modify the amount allowed as attorney's fees. The assignment as a cause for a new trial that the damages are excessive, does not call in question the amount of the recovery in an action on contract. It has often been decided that this assignment is only applicable to cases of tort. *Lake Erie, etc., R. W. Co. v. Acres*, 108 Ind. 548; *Thomas v. Merry*, 113 Ind. 83; *McCormick H. M. Co. v. Gray*, 114 Ind. 340; *Moore v. State, ex rel.*, 114 Ind. 414.

It is likewise settled that the mere fact that the verdict or finding is for an amount in excess of that asked for in the complaint, can not be assigned as a cause for a new trial in any form, in case the facts stated, and the evidence adduced, entitle the plaintiff to recover the amount found. If the judgment is for too large a sum, application must first be made to the court below by the party injured to correct it; and in the absence of such an application, as presumably the complaint would have been amended in the court below if objection to the amount of recovery had been made, the amendment will be treated as made, on appeal. *Barnes v. Roemer*, 39 Ind. 589; *White v. Stellwagon*, 54 Ind. 186; *Webb v. Thompson*, 23 Ind. 428; 1 Works Pr., section 911.

The objections predicated upon rulings of the court in admitting in evidence the report and assessments of benefits, made by the commissioners of drainage, and the entry made by the plaintiff as drainage commissioner, showing the assessments made for the construction of the drain, are not tenable. This was the proper method of proving the amount which the plaintiff was entitled to recover against the defendants respectively. We have found no error.

The judgment is affirmed, with costs.

Filed Jan. 23, 1889.

 Keiser v. Beam.

No. 12,427.

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117	31
140	359
117	31
147	118

SUPREME COURT.—*Reversal of Judgment.*—*Failure of Proof.*—A judgment will be reversed where there is an entire failure of proof as to a fact essential to the support of the action.

JUDGMENT.—*Payment by Conveyance of Property.*—*Rights of Sureties.*—Where a judgment surety has become the owner of the judgment, and afterwards takes a conveyance, importing a money consideration, of real estate from his principal, an order of the court, made at the suit of a co-surety, declaring the judgment satisfied, will not be sustained unless it is shown that the property so conveyed by the principal was in payment of the judgment.

SAME.—*Conveyance of Property to Surety.*—*Satisfaction as to Co-Surety.*—Where a principal judgment debtor conveys to a surety, who has become the owner of the judgment by assignment, real estate upon which the judgment is a lien, in consideration of the payment by the surety of liens prior to the judgment, the judgment can not be declared satisfied as to a co-surety beyond the one-half of the value of the property in excess of the amount of the liens which the grantee agreed to pay.

From the Henry Circuit Court.

J. Brown, W. A. Brown and E. P. Schlater, for appellant.
J. H. Mellett and E. Bundy, for appellee.

BERKSHIRE, J.—The complaint in this case averred that on the 5th day of September, 1876, the Citizens' State Bank of New Castle, Indiana, recovered a judgment in the Henry Circuit Court in the sum of \$808.80, and costs, taxed at \$20, against John U. Keiser and the appellee upon a note executed by John U. Keiser as principal and the appellee and appellant as sureties; that at the time the judgment was rendered John U. Keiser was the owner of real estate in New Castle, Henry county, Indiana, of the value of \$5,000, upon which the judgment became a lien; that after the judgment was rendered John U. Keiser conveyed the said real estate to the appellant, the consideration in part being the payment by him of the said judgment; that afterward the appellant

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procured an assignment of the judgment from the bank to himself; that he thereafter conveyed the real estate, and the judgment had been paid and satisfied. There is no charge of bad faith in the complaint.

Then follows the prayer for relief, which is, that the judgment be declared paid and satisfied.

The answer of the appellant was a general denial.

The cause was tried by a jury, a verdict returned for the appellee, and a judgment rendered declaring the original judgment paid and satisfied.

There is but one error assigned, and that is, that the court erred in overruling the appellant's motion for a new trial. It is only necessary to refer to two of the reasons embodied in the motion for a new trial.

These are the first and fourth :

The first is, that there is not sufficient evidence to sustain the verdict.

The fourth is, that the court erred in giving instruction number two.

It is a rule of this court, of long standing, that a judgment will not be reversed and a new trial granted for want of sufficient evidence, where there is some evidence tending to establish each material fact in issue.

Upon the other hand, the rule is equally well established that a judgment will be reversed and a new trial granted whenever there is an entire failure of proof as to any fact essential to the support of the action.

The gist of this action is, that after the appellant became the owner of the judgment in question, John U. Keiser paid it by conveying to the appellant certain real estate in the town of New Castle, Henry county, Indiana.

We have carefully read the evidence as copied into the record, and have failed to find any evidence to prove payment, by the conveyance of real estate or otherwise. The plaintiff's evidence in chief is in substance as follows:

The record of a judgment in favor of the Citizens' State

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Bank of New Castle, Indiana, against John U. Keiser, George Beam and Samuel Keiser for the amount of \$808.80, and for costs amounting to \$20. An agreement made on the trial that at the date of the said judgment John U. Keiser was the owner of certain real estate in New Castle upon which the judgment at once became a lien.

The record of a deed from John U. Keiser and wife to Samuel Keiser for the real estate to which the agreement referred. The consideration named in this deed is \$4,500, and it bears date July 22, 1878, and was recorded August 22, 1879.

The record of a deed from Samuel Keiser to Mary E. Keiser for a part of the real estate that had been conveyed to Samuel by John U. Keiser and wife. The consideration named in this deed is one hundred dollars, and it bears date July 22, 1879, and was recorded Sept. 6, 1879.

The record of a deed from Samuel Keiser and wife to Robert M. Nixon. The consideration named in this deed is four thousand dollars, and it bears date January 17, 1881, and was recorded February 2, 1881.

Robert M. Nixon testified that he paid \$4,000 for the property, \$3,600 to Samuel Keiser, \$90 to Mellett & Bundy on Samuel Keiser's account, \$32 costs, and the balance to John U. Keiser.

The plaintiff having rested his case, the defendant was examined and testified as to the consideration paid by him for the conveyance from John U. Keiser and wife, and testified that the payment of the judgment in question did not enter into the consideration paid; that the consideration named in the deed was the true consideration, and was made up in the assumption and payment of liens senior to the lien of the judgment in question.

John U. Keiser testified to substantially the same facts.

In rebuttal the plaintiff introduced two witnesses to contradict John U. Keiser, and they testified that he had stated to them that the judgment in question formed a part of the

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consideration for the conveyance executed by himself and wife to Samuel Keiser.

This testimony, at most, was only competent for the purpose of discrediting John U. Keiser as a witness. As to the main fact, it was wholly immaterial.

There was no evidence as to the value of the property at the time it was conveyed to Samuel Keiser, other than the consideration named in the deed. And there was no evidence that the consideration named in the deed was not the true consideration, and that it did not consist in the assumption and payment of encumbrances senior to the judgment in question.

The instruction to which the fourth reason stated in the motion for a new trial relates is as follows :

“ If Samuel Keiser paid to the bank the judgment in question, and took an assignment thereof to himself, and the judgment was a lien on the real estate of John U. Keiser, and John U. Keiser afterward conveyed his real estate to said Samuel Keiser in satisfaction of prior liens on the same to said judgment, and Samuel Keiser afterward conveyed to other parties the property received by him, and if the property received by him was, at the time the defendant received the deed therefor, of greater value than the liens thereon prior to the lien of said judgment, the excess would be a satisfaction of said judgment to the amount of such excess, and if such excess, if any, amounted at the time to one-half of the judgment, it would amount to a full satisfaction as to the plaintiff Beam.”

If the law is correctly stated in this instruction, whenever a debt has been reduced to a judgment, which, by statute, becomes a lien upon real estate, a surety purchasing of the principal debtor any part of his real estate thus encumbered, where there is a co-surety, makes the purchase at his peril.

His purchase may be in the best of faith, and he may pay all that he believes the property to be worth, and all that he would

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be willing to give for it under the most favorable circumstances, and more than it would bring at a forced sale to pay older encumbrances, and, notwithstanding, his co-surety may bring an action to have the judgment declared satisfied, and if witnesses can be found who will testify that the property was worth more than the older encumbrances, the co-surety may maintain an action to have the judgment satisfied as to him to an amount equal to the excess in value as thus proven.

We know of no rule of law or principle in equity that will support the instruction, and we have found no authority to sustain it.

The statute provides a remedy whereby even-handed justice can be done to all the parties.

Section 1214, R. S. 1881, reads as follows: "When any defendant surety in a judgment, or special bail or replevin bail, or surety in a delivery bond or replevin bond, or any person being surety in any undertaking whatever has been or shall be compelled to pay any judgment or any part thereof; or shall make any payment which is applied upon such judgment by reason of such suretyship; * * * * the judgment shall not be discharged by such payment, but shall remain in full force for the use of the bail, surety, * * * making such payment; and after plaintiff is paid, so much of the judgment as remains unsatisfied may be prosecuted to execution for his use."

Section 1215 reads as follows: "Any one of several judgment defendants, and any one of several replevin bail, having paid and satisfied the plaintiff, shall have the remedy provided in the last section against the co-defendants or co-sureties, to collect of them the ratable proportion each is equitably bound to pay."

Had the appellant pursued this simple statutory remedy, and caused the real estate of which John U. Keiser was the owner, and upon which the judgment became a lien, to be sold upon execution, subject to the senior liens, he, together

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with his co-surety, the appellee, could have had the benefit of the excess, if any.

Had that course been pursued, the appellant would not have been required to respond to meet the imaginary ideas of witnesses as to values, a species of evidence that is nearly always unreliable and unsatisfactory.

The instruction is objectionable, furthermore, because by it the jury are told that if the property conveyed to the appellant exceeded in value the amount of the senior encumbrances, and the excess amounted to one-half of the judgment in question, the judgment as to the appellee was in effect satisfied.

As between themselves, the appellant and appellee were each liable to pay the one-half of the judgment. If one of them paid in excess of his one-half, the other was bound to contribute the one-half of the excess back to him.

If, therefore, the property conveyed by John U. Keiser to the appellant was only worth an amount in excess of the senior encumbrances equal to the one-half of the judgment in question, the appellant's rights were equal to those of the appellee, and he had the right to have the one-half of the excess applied to the judgment for his benefit, and that would only leave remaining for the benefit of the appellee an amount equal to the one-half of the half for which he was liable. The instruction gave to the appellee the benefit of the entire amount to the exclusion of the appellant.

The judgment is reversed, with costs.

Filed Jan. 23, 1889.

Amos v. Amos et al.

No. 13,167.

AMOS v. AMOS ET AL.

DEED.—*Remainder*.—*Vesting*.—*Presumption*.—The law not only favors the vesting of remainders, but it also presumes that words postponing the estate relate to the beginning of the enjoyment of the remainder and not to the vesting of the estate.

SAME.—*Descent*.—*Estate Taken by Intestate in Consideration of Love and Affection*.—*Rights of Widow*.—Under section 2473, R. S. 1881, relating to an estate coming to an intestate in consideration of love and affection, the widow takes only by virtue of her marital rights, and not as an heir or descendant.

SAME.—*Reversion to Donor*.—*When Widow has no Interest*.—Where, in consideration of love and affection, land is conveyed to A. for life, with the fee to his children begotten in wedlock, and, failing children, to other persons, the remainder vests immediately upon the birth of a child, and upon the death of both A. and the child without children, the land reverts to the donor under the statute, the limitation to others not being effectual; but whether the limitation over be considered as effectual or void, the widow of A. has no interest in the land.

From the Rush Circuit Court.

J. Q. Thomas, J. J. Spann, G. C. Clark, D. S. Morgan and H. E. Barrett, for appellant.

ELLIOTT, C. J.—The facts in this case are the same as in the case of *Amos v. Amos*, ante, p. 19, and the controversy grows out of the same instruments to which we there gave a construction. The principal controversy here is between the widow of Liford K. Amos and the grantor in the deed referred to in that case, she claiming the entire estate in the land conveyed to her husband for life by his grandfather, while the grandfather, Joseph J. Amos, Sr., claims that the title to two-thirds, at least, of the land reverted to him. The other parties claim, as in the former case, that they took the entire estate when Liford K. Amos died.

In addition to what was said in the former case upon the

117	37
119	530
117	37
129	68
129	90
117	37
123	204
117	37
124	426
117	37
137	418
117	37
143	280
143	339
117	37
144	413
144	575
117	37
159	116
117	37
165	203

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question of the vesting of the remainder during the life of the tenant of the particular estate, we affirm, as an established principle, that the law not only favors the vesting of remainders, but it also presumes that words postponing the estate relate to the beginning of the enjoyment of the remainder and not to the vesting of that estate. *Davidson v. Koehler*, 76 Ind. 398; *Davidson v. Bates*, 111 Ind. 391; S. C., 12 N. E. Rep. 687, and authorities cited in note; *Davidson v. Hutchins*, 112 Ind. 322. The words creating the remainder in this instance, which postponed the enjoyment of the estate in remainder until after the termination of the particular estate, did not postpone the vesting of the remainder, but that estate vested immediately on the birth of the child of Liford K. Amos.

Between the widow, Eva W. Amos, and the grandfather of her deceased husband, the question is whether section 2473 of the R. S. of 1881 governs, or whether the case falls within the general law of descents. That section, so far as it is relevant here, reads thus: "An estate which shall have come to the intestate by gift or by conveyance, in consideration of love and affection, shall, if the intestate die without children or their descendants, revert to the donor, if living, at the intestate's death, saving to the widow or widower, however, his or her rights therein."

This statute makes provision for a peculiar class of cases, and expressly excepts it from the rules which prevail in ordinary cases. In *Myers v. Myers*, 57 Ind. 307, it was held that under this section the widow would take one-third of the land, not as heir, but in virtue of her rights as a surviving wife. A like ruling was made in *Mitchell v. Parkhurst*, 17 Ind. 146. In *Thomas v. Thomas*, 18 Ind. 9, it is taken for granted that this statute governs in all cases where the consideration is love and affection and the donee dies without children before the death of the donor, and it was held that the saving clause in it protects the widow. It was held

Amos v. Amos *et al.*

in *Fontaine v. Houston*, 86 Ind. 205, that a husband who had conveyed land to his wife in consideration of love and affection was entitled to the entire estate upon her death without children. In line with these cases is that of *Kennedy v. Phillippy*, 91 Ind. 511. The only difficulty in this case, in view of these authorities, is presented by the ruling of the trial court asserting that the widow took one-third of the land, for her husband had only a life-estate. As that terminated with his death, it is not easy to perceive how she took any estate at all. Under the statute immediately before us, a widow takes only by virtue of her marital rights, and not as an heir or descendant. *Myers v. Myers*, *supra*; *Brown v. Harmon*, 73 Ind. 412; *Wood v. Beasley*, 107 Ind. 37; *McNutt v. McNutt*, 116 Ind. 545. It is clear that the statute does not refer to her as an heir or descendant, since to affirm that conclusion would be to assert that the Legislature did an idle thing in expressly preserving her rights. Eva W. Amos got as much, and more, perhaps, than she was entitled to in securing one-third of the land, and she, at all events, has no cause of complaint.

It is certain that both Liford K. Amos and his son got all the estate that ever vested in them from Joseph J. Amos, Sr., and that the consideration which induced the grant was love and affection, so that it is difficult to resist the conclusion, that, upon the death of Liford K. and his son, without children, the estate reverted to the donor. This phase of the controversy is not affected by the fact that the child of Liford K. took an estate in fee during his father's lifetime, for the asserted limitation over was not effectual, but had it been, still the statute would preserve the rights of the donor as against the appellant, Eva W. Amos. She is in this dilemma: If there was a valid limitation to the other grandchildren of Joseph J. Amos, Sr., it became effective upon the death of her child during the lifetime of her husband; but, if there was no such valid limitation, then, as neither her

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child nor her husband died leaving children, the estate reverted to the donor under the statute, and in either case she has no interest in the land.

Judgment affirmed.

Filed Jan. 23, 1889.

No. 12,716.

POLLARD v. BARKLEY ET AL.

DECEDENTS' ESTATES.—Final Settlement.—Jurisdiction to Set Aside.—The circuit courts have jurisdiction to set aside final settlements of administrators for fraud, mistake or illegality.

SAME.—Proceeding to Set Aside.—Remedial Statute.—Statutes providing for the setting aside of such settlements are remedial, and proceedings for that purpose must be prosecuted under the statute in force at the time they are commenced.

SAME.—Attorney Fees.—Administrator not Entitled to.—An allowance of attorney fees to an administrator for his personal services as an attorney in the settlement of an estate, is prohibited by sections 2396 and 2398, R. S. 1881, and, if made, constitutes an "illegality" for which the settlement may be set aside, within the meaning of section 2403.

SAME.—Evidence.—Where a sum has been allowed to an administrator for his services as such and as an attorney, it is proper, in a proceeding to set the settlement aside, for the court to hear evidence as to the value of the services rendered as administrator, in order to ascertain the amount allowed as attorney fees.

SAME.—Administrator's Allowance.—In making an allowance to an administrator for his services, the nature of the estate, the difficulties attending the recovery of the assets, the peculiar qualifications of the administrator, the advantage to the estate from such qualifications, and all other facts and circumstances which will enable the court to come to a proper conclusion, should be considered.

From the Carroll Circuit Court.

J. Applegate and *D. Turpie*, for appellant.

W. E. Uhl, for appellees.

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ZOLLARS, J.—Appellant's final settlement as administrator of the estate of Robert Barkley, deceased, was approved by the court, and he was discharged on the 7th day of February, 1881.

Appellees, as the heirs at law of said Barkley, commenced this action on the 6th day of February, 1884, and, for the reasons stated in their complaint, asked that the settlement be set aside.

When the courts of common pleas were in existence and had jurisdiction in probate matters, the law provided that, on appeal from that court to the circuit court, a final settlement of an administrator might be set aside, if, upon such appeal, it was made to appear that such settlement had been illegally made. It also provided that a person interested in the estate might, by a direct proceeding, have such a settlement set aside for fraud or mistake. 2 R. S. 1876, p. 537.

The courts of common pleas were abolished in 1873, and their jurisdiction in all cases was transferred to the circuit courts. The above mentioned statute was not changed, but it was held that by the act abolishing the courts of common pleas and transferring their jurisdiction to the circuit courts, those courts had jurisdiction to set aside such final settlements for fraud, mistake and illegality. *Heaton v. Knowlton*, 65 Ind. 255 (261).

With some restrictions and enlargements not material to be considered here, the statute of 1881 upon the same subject is substantially the same as the former statute. R. S. 1881, section 2403. Under this latter statute, such final settlements may be set aside upon the petition of a person interested in the estate, "particularly setting forth the illegality, fraud, or mistake in such settlement or in the prior proceedings in the administration of the estate, affecting him adversely."

So far as concerns the case in hearing, it is not material whether the proceeding be regarded as under the statute of 1881, or under the former statute, in force when the final

Pollard v. Barkley et al.

settlement was approved. In our judgment, however, the former statute was, and the latter is, remedial, and hence this proceeding must be regarded as under that of 1881.

The only reason set forth in the complaint and shown by the evidence for setting aside the final settlement, which we need notice, is that of "illegality." The statute in force at the time the final report was approved provided, as does that in force now, that no allowance of attorney fees should be made to an administrator for his personal services as an attorney in the settlement of the estate. 2 R. S. 1876, p. 546, section 149; R. S. 1881, sections 2396, 2398.

The enforcement of that statute in this case, it is apparent, will work a hardship and injustice to appellant, but the courts must enforce the laws as they find them, leaving the policy of their enactment to the Legislature. The allowance of attorney fees to an administrator, for his personal services as an attorney in the settlement of the estate, is a violation of the positive terms of the statute, and hence an illegality for which a final settlement will be set aside, just as there is illegality in a final settlement of an estate made when an unallowed claim is pending against it. 2 R. S. 1876, p. 535, section 112; R. S. 1881, section 2401; *Dillman v. Barber*, 114 Ind. 403; *Roberts v. Spencer*, 112 Ind. 81; *Reed v. Reed*, 44 Ind. 429; *Heaton v. Knowlton*, *supra*; see, also, *Cumper v. Hayeth*, 10 Ind. 528; *Miller v. Steele*, 64 Ind. 79; *Zeek v. Reed*, 69 Ind. 319; *Taylor v. Wright*, 93 Ind. 121.

In support of the charge of illegality in the allowance to and the retention by appellant of attorney fees for personal services as an attorney in the settlement of the estate, appellees introduced in evidence his final report, which had been approved, as already stated. That report and its approval show that such fees were allowed.

The court heard evidence for the purpose of showing how much appellant's services as administrator were worth, as a means of ascertaining, as near as might be, how much of the sum allowed to him was for services as attorney. For that

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purpose the evidence, we think, was competent. As appellant did not testify upon that subject, the evidence is somewhat meager and not very satisfactory. And for that reason, it may be, the court, in its final judgment setting aside the settlement ruled that the finding and conclusion upon that subject shall not be conclusive, nor in any way binding upon appellant or the court in settling the amount to be allowed to him hereafter for his services as administrator.

While we are constrained to hold that, by reason of the statute, nothing can be allowed to him for personal services as attorney, it is apparent from the record that he is entitled to a liberal allowance for his services in the settlement of the estate. All that he received as assets of the estate, he recovered upon a disputed and contested claim. In the prosecution of that claim it was necessary to take depositions in a distant State. The cause was tried three times in three different counties, and was twice in this court on appeal. When the claim was finally recovered, the interest amounted to about as much as the original claim. It seems also, that in addition to his other services, appellant advanced the money to carry on the litigation. The expenses of the litigation, extending over a period of near ten years, were necessarily large, but that is no sufficient reason why appellant should not receive a just and ample compensation for his services. In the making of such allowance, the court is not bound by any unbending rule, but will consider the nature of the estate, the difficulties attending the recovery of the assets, and the settlement of the estate; the peculiar qualifications of the administrator, the advantage to the estate from such qualifications, and all other facts and circumstances which will the better enable it to do justice as between the estate and the administrator.

It is contended, in a brief filed by one of appellant's counsel, that the evidence shows that Barkley, in his lifetime, despairing of ever recovering the claim, declined to advance money to carry on the litigation, and made an equitable as-

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signment of the claim to appellant, and that, therefore, the amount recovered upon the claim equitably belonged to appellant, and not to the estate. It is not necessary for us to here express any opinion as to the weight or effect of the testimony upon that subject. This action is to set aside the final settlement simply, and that settlement was upon the theory that the money which came into appellant's hands belonged to the estate.

It is altogether probable that when appellant again files his final settlement report, his rights in the premises, and the question as to the proper amount to be allowed to him, will be more fully presented than they are by the record before us.

Judgment affirmed, with costs.

Filed June 15, 1888; petition for a rehearing overruled Jan. 23, 1889.

No. 12,981.

BURNS, EXECUTOR, ET AL. v. TRAVIS ET AL.

WILL.—*Revocation.*—*Contest After Probate.*—*Bond.*—Where, after a will has been admitted to probate, a verified complaint is filed, alleging that the will had been revoked by the execution of a later will and that its admission to probate was unlawful, and praying that the probate thereof be annulled and the later will admitted to probate, such proceeding is, in legal effect, an application to contest the will, within the meaning of section 2597, R. S. 1881, and can not be maintained unless a bond is filed as required by that section.

SAME.—*Estoppel.*—The probate of a former will can not be pleaded in estoppel of an application to admit a later will to probate, unless the applicant has had such a connection with the former will, or the probate proceedings upon it, as to estop him from denying its validity.

SAME.—*Effect of Probate.*—The *ex parte* probate of a will ascertains nothing

117	44
146	370
146	623

117	44
148	686
117	44
154	37

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but the *prima facie* validity of the instrument, and that it is seemingly what it purports to be on its face.

SAME.—Revocation.—If a will, duly subscribed and attested, expressly revokes all prior wills executed by the testator, it is valid for that purpose, under section 2559, R. S. 1881, whether it is effectual as a testamentary disposition of property or not.

SAME.—Joinder of Causes.—It is proper to join with an application for the admission of a later will to probate, a demand that the probate of a former will be set aside.

From the Shelby Circuit Court.

J. Harrison, R. W. Harrison, B. F. Love, A. Major and H. C. Morrison, for appellants.

T. B. Adams, L. T. Michener and J. A. Tindall, for appellees.

NIBLACK, C. J.—On the 14th day of March, 1885, Catharine Travis, late of Shelby county, executed and published an instrument in writing purporting to be her last will and testament, by which she assumed to devise all her real estate to her daughter, Jennie Burns, and to bequeath to her other children, Joseph W. Travis, Frank Travis, Leonard Travis and Lutheria Odell, all of her personal estate, to be equally divided between them, and in which she named Solomon T. Burns as her executor.

On the 25th day of the same month she died, and two days later the execution of the instrument in writing in question was duly proven in open court, and it was admitted to probate as her last will and testament. Letters testamentary were thereupon issued to the said Solomon T. Burns, who was the husband of the devisee, Jennie Burns.

On the 26th day of May, 1885, Joseph W. Travis and Frank Travis filed in the court below their complaint, in the form of a petition, setting forth the facts substantially as above stated, and averring that Catharine Travis had, on the 23d day of March, 1885, executed and published another will in due form of law, which was made an exhibit accompanying the petition, and by which the will previously executed by her,

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as stated, on the 14th day of the same month, was revoked; also averring that by reason of the premises such former will was void, and the probate thereof was unlawful. Wherefore the petitioners demanded that the probate of such former will should be set aside and annulled; that the letters testamentary issued to the said Solomon T. Burns should be revoked, and that the will presented by and accompanying the complaint should be admitted to probate as the last will and testament of Catharine Travis.

The said Solomon T. Burns and Jennie Burns were made defendants to the proceedings, and the complaint was duly verified.

No bond was filed, as required by section 2597, R. S. 1881, in case of the contest of a will after the probate thereof, and for that reason the defendants moved to dismiss the complaint, but their motion was overruled. They then moved to strike out of the complaint all that referred to the former will so executed on the 14th day of March, 1885, and to the proof and admission to probate thereof, upon the ground that such matter was irrelevant and improper as incidental to an application to have a subsequent will admitted to probate, and that motion was sustained.

The defendants thereafter answered the complaint as thus eliminated, setting up the execution and probate of the former will in estoppel of the application to have the alleged subsequent will proven and admitted to probate, to which a demurrer was also sustained. Issue being otherwise joined, the circuit court heard the evidence and made a finding that the instrument in writing presented by, and accompanying, the complaint was the last will and testament of the decedent, Catharine Travis, and ordered the same to be admitted to probate and entered of record as such last will and testament.

Questions were reserved below, and are pressed here, upon the overruling of the motion to dismiss the complaint for want of a bond to secure a prosecution of the suit and the payment of costs, and upon the sustaining of the demurrer

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to the answer in estoppel of the proceedings upon the complaint.

Section 2595, R. S. 1881, provides, in effect, that any person interested in the estate of the decedent may file objections to the admission of a will to probate, and, through the medium of such objections, cause the validity of the will to be contested. The two succeeding sections are as follows:

Sec. 2596. "Any person may contest the validity of any will, or resist the probate thereof, at any time within three years after the same has been offered for probate, by filing in the circuit court of the county where the testator died, or where any part of his estate is, his allegation, in writing, verified by his affidavit, setting forth the unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress or was obtained by fraud, or any other valid objection to its validity or the probate thereof; and the executor and all other persons beneficially interested therein shall be made defendants thereto."

Sec. 2597. "Before any proceedings shall be had on an application to contest a will after probate thereof, the person making the same, or some other person in his behalf, shall file a bond, with sufficient sureties, in such amount as shall be approved by the clerk of such circuit court, conditioned for the due prosecution of such proceedings and for the payment of all costs thereon in case judgment be awarded against him."

The execution of a new will making another and inconsistent disposition of the testator's property operates as a revocation of a former will disposing of the same property, and this is so whether the former will is expressly revoked by the later one or not. Schouler Ex'rs and Adm'rs, section 82; 1 Jarman Wills, 336; *State, ex rel., v. Crossley*, 69 Ind. 203.

A will may become operative as a revocation of a former will, although inoperative in other respects. *Laughton v. Atkins*, 1 Pick. 535.

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A revoked will is an invalid will, and hence it is a sufficient objection to a will, as well as to the probate of it, when it has been admitted to probate, that it has been revoked, whether expressly or impliedly. It follows that the revocation of a will affords good cause for contesting the validity of such an instrument, as well as resisting or setting aside the probate of it under section 2596, above set out. The allegation, therefore, of the complaint of the appellees, that the will which was already admitted to probate had been revoked by the execution and publication of a later will, and that by reason of this fact its admission to probate was unlawful, was an attack both upon the validity of the will and the probate, and amounted in legal effect to an application to contest the will, within the meaning of section 2597 of the statutes, to which we have referred. As has been seen, the complaint sought further relief by the admission of the later will to probate, but the right of the appellees to this further relief was dependent upon their ability to show that the former will had been revoked, and hence, because the complaint contained other matters, it was none the less a verified application to contest the validity of a will which had been admitted to probate.

The circuit court consequently erred, either in refusing to dismiss the complaint for want of a bond, as is provided by section 2597, or in failing to require the filing of such a bond before proceeding further. *Coffman v. Reeves*, 62 Ind. 334; *Kinnaman v. Kinnaman*, 71 Ind. 417.

In the very nature of the proceeding, the probate of a former will can not be pleaded in estoppel of an application to admit a later will to probate, unless the applicant has had such a connection with the former will, or the probate proceedings upon it, as to estop him from denying its validity. There was nothing in the answer to which the demurrer was sustained in this case which showed, or tended to show, such an estoppel as against the appellees. In conse-

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quence, the circuit court did right in holding that the answer was bad upon demurrer. *Martin v. Perkins*, 56 Miss. 204.

Schouler, *supra*, at section 82, says that "Any distinct will propounded for probate, which appears to have been executed as the statute requires, and preserved intact, is presumed to express the testator's last wishes; but this presumption may be rebutted by the production of a later will, or other evidence of a contradictory nature."

The *ex parte* probate, therefore, ascertains nothing but the *prima facie* validity of a will, and that the instrument is seemingly what it purports to be on its face. *Ex parte Fuller*, 2 Story, 327.

Cross-error is assigned upon the striking out of the complaint all that pertained to the former will and the probate of it, as hereinabove stated.

There was no inconsistency between the two kinds of relief demanded by the complaint. Both belonged to the same jurisdiction, and both had relation to the subject-matter of the estate of the testatrix, already in charge of the court. There was, therefore, no misjoinder of causes or surplusage of averments. For these reasons the cross-error is well assigned.

The further point is made that the new will makes, or rather attempts to make, only the same disposition of the testatrix's estate which the law would make of it in the event that she had died intestate, and that it is for that cause inoperative as a testamentary instrument, or for any other purpose. Without examining, or intimating any opinion as to, the question of the efficiency of the instrument as a testamentary disposition of property, it is sufficient to refer to the fact that the first clause of the instrument, as an independent proposition, expressly revokes all wills then recently made by the alleged testatrix, and that the instrument purports to have been duly subscribed and attested. This makes the instrument, at all events, a valid revocation in writing of the

Thomas *et al.* v. Stewart *et al.*

former will, within the provisions of section 2559, R. S. 1881.

No question was made below upon the defect of parties to the complaint, and hence no such question is presented here. It is worthy of note, however, that all the persons interested in the property of the testatrix were not made parties, as required by section 2596 of the existing statutes, to which reference has been made.

As the first error was committed in favor of the appellees, the judgment will be reversed, at their costs. Reversed accordingly.

Filed Oct. 9, 1888; petition for a rehearing overruled Feb. 20, 1889.

117	50
135	243
117	50
130	148
117	50
152	562

No. 13,434.

THOMAS ET AL. v. STEWART ET AL.

SUBROGATION.—*Surety.*—*Sheriff's Sale.*—*Redemption.*—*Innocent Purchasers.*—

Where a surety permits a judgment to be taken against him as a joint principal, and stands by until other persons, without notice of his rights other than that afforded by the record, have acquired title to the principal's property through the foreclosure of a prior mortgage, and have made valuable improvements thereon, he can not afterwards, having paid the judgment, establish his suretyship as against the good faith purchasers and be subrogated to the right of the judgment creditor, who was not a party to the foreclosure proceedings, to redeem from the sale thereunder.

From the Clay Circuit Court.

D. E. Williamson, A. Daggy and S. McGregor, for appellants.

W. W. Carter, J. D. Cornell and G. A. Knight, for appellees.

Thomas et al. v. Stewart et al.

MITCHELL, J.—Stewart and Andrew filed a complaint in the nature of a bill in equity, in which they claimed the right to establish their relation as sureties to a joint judgment theretofore recovered against the plaintiffs and one Jacob Thomas, and to be permitted to redeem certain real estate formerly owned by Thomas, which had been sold to satisfy a prior mortgage.

The facts as specially found by the court show that Thomas mortgaged a certain lot in the city of Brazil, in Clay county, to Abel McQueen, on the 4th day of October, 1877, to secure a debt of \$800, due in one year from date, with ten per cent. interest. Afterward, on the 1st day of February, 1879, Robert M. Wingate recovered a judgment in the Clay Circuit Court against Thomas, Stewart and Andrew, for \$591.25. On the 10th day of March, 1879, McQueen instituted proceedings to foreclose his mortgage, making Thomas and wife and others, who were junior lien-holders, parties, but Wingate, who had theretofore recovered judgment as above mentioned, was not made a party, nor did he have any notice of the proceedings by McQueen. The mortgage was duly foreclosed, and the land sold in pursuance of the decree to McQueen, who obtained title under the sale, in due time. Afterward, on the 11th day of November, 1880, McQueen conveyed the property to Rebecca A. Thomas, who, within ten days thereafter, sold and conveyed a part of the tract to George Haberle, for the consideration of \$1,000, paid in cash, and the residue to Jacob Baumunk, who paid a like consideration. The part conveyed to Baumunk was afterward sold by him to Michael and Mary Ryan. The several purchasers from Mrs. Thomas went into possession immediately, and made lasting improvements of the value of \$3,000. Jacob Thomas died intestate on the 18th day of February, 1880, leaving Rebecca A. his widow and sole heir. His estate was wholly insolvent, and was so settled at the March term, 1883, of the Clay Circuit Court. Stewart and Andrew paid \$834.40 in satisfaction of the Wingate judg-

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ment, on the 28th day of September, 1882. It is found that they were sureties for Thomas, but the judgment in favor of Wingate was rendered against the three jointly, without any issue or adjudication of suretyship. Mrs. Thomas had actual notice of the suretyship of Stewart and Andrew, but her grantees had no other notice, except such as the record of the judgment afforded. Stewart and Andrew both resided in the city of Brazil, and had notice of the improvements that were being made by the defendants. This action was commenced May 20th, 1885, the plaintiffs having shortly prior thereto offered to redeem, but their right to redeem was denied and the offer refused.

Upon the facts found, the material part thereof being, in substance, as above stated, the court stated conclusions of law to the effect that Stewart and Andrew, as sureties for Thomas, were subrogated to the right of Wingate, they having paid the judgment in favor of the latter, and that they were hence entitled to redeem the land owned and improved by Haberle and the Ryans, upon terms fixed in the decree. The merits of the appeal are all involved in a determination of the propriety of the conclusions of law stated upon the facts found.

Wingate, having recovered a judgment which constituted a lien upon the real estate owned by Thomas, and previously mortgaged by the latter to McQueen, and not having been made a party to the foreclosure proceedings by the latter, had the undoubted right to redeem from the McQueen sale.

This right continued in him until his judgment was paid off and satisfied. The defendants, having acquired the legal title as purchasers, might have compelled him to come in and exercise his right upon terms, or be forever barred therefrom, by proceedings in the nature of a strict foreclosure. *Jefferson v. Coleman*, 110 Ind. 515, and cases cited.

This was not done, but after standing open until September, 1882, the judgment was satisfied by the plaintiffs, who were apparently joint principals, and thus all right of re-

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demption was extinguished, so far as anything appeared upon the record of that judgment. The question now arises, may the plaintiffs establish their relation as sureties to the judgment, and avail themselves of Wingate's right of redemption, upon the principles of equitable subrogation, as against the defendants, who relied upon, and who were charged with notice of, the record as it appeared ?

It is, of course, abundantly settled that a surety, who has been compelled to pay the debt of his principal, will be subrogated to all the rights, remedies, liens, and equities of the creditor. Payment by a surety, although it may discharge the debt, and extinguish liens or securities held by the creditor, does not have that effect as between the principal debtor and his surety. As between them, payment by the latter is in the nature of a purchase from the creditor, and operates as an equitable assignment of the debt, and all its incidents to the surety. *Orem v. Wrightson*, 51 Md. 34 ; *Brandt Sur.*, section 260.

This equitable right is cumulative, and exists entirely independent of any statutory provisions, and is equally available to the surety, except when the rights of innocent purchasers intervene, whether the question of suretyship has or has not been determined in the statutory method. *Gipson v. Ogden*, 100 Ind. 20 ; *Peirce v. Higgins*, 101 Ind. 178 ; *Pence v. Armstrong*, 95 Ind. 191 ; *Sheldon Sub.*, section 86.

Subrogation is, however, founded on the principles of equity and benevolence, and is not to be allowed in favor of one who has permitted the equity he asserts to sleep in secrecy until the rights of others would be injuriously affected by its assertion and enforcement. *Gring's Appeal*, 89 Pa. St. 336 ; *Sheldon Sub.*, sections 110, 111.

A court of equity acts on the conscience, and as one who has purchased or expended money in good faith without notice is in no fault, there is no ground for a demand upon his conscience in favor of one whose lack of diligence in failing

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to make known a latent equity would result in injury to others who are without fault.

This leads us to inquire as to the situation of the parties so far as exhibited by the record. The Wingate judgment was recovered in February, 1879. So far as could be learned from the record, no one dealing with the land owned by Thomas could know that Stewart and Andrew were not only equally bound as co-defendants of record, but equally liable as principals to pay the judgment. 'The rule is that suretyship will never be presumed, and that where a judgment is joint, those against whom it is rendered are all to be regarded as principals, and persons dealing with land upon which a judgment so taken is a lien may proceed upon that presumption until they have notice to the contrary. *Laval v. Rowley*, 17 Ind. 36; *Reissner v. Dessar*, 80 Ind. 307; *Har-ker v. Glidewell*, 23 Ind. 219; *Dougherty v. Richardson*, 20 Ind. 412.

Persons who purchase real estate from one of three joint judgment debtors, have a right to take into account the liability of the other two as it appears upon the record, and they may regulate their conduct according to the known or apparent solvency or insolvency of those jointly liable.

The statute furnishes an easy and convenient method by which sureties may have the fact of their relation to the judgment established, and if, through their failure to avail themselves of the benefit of the statute, a third party acts on the faith of the record, they have no right to complain.

The present case is controlled by the principles which ruled in *Dougherty v. Richardson*, *supra*, in which it appeared that Speake recovered a judgment against Crawford and Sinex, both of whom appeared on the face of the record as principals. Shortly after the rendition of the judgment Crawford sold part of his real estate for its full value, and the part so sold eventually passed into the hands of Dougherty. After having sold the remaining property owned by Crawford, upon execution, the judgment being still unsatisfied, the property

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conveyed to Dougherty as above was levied upon. The latter brought suit to enjoin the sale, setting up the facts as above, and alleging that Sinex was the owner of real and personal property more than sufficient to satisfy the judgment, and that Crawford and the other intervening grantors were insolvent. Sinex answered, setting up that he was only surety for Crawford, and claimed the right to be exonerated as such, until the property owned by his principal, at the date of the judgment, should first be exhausted. The court held that Sinex, having stood by and suffered himself to be regarded as a principal debtor, until after the vendees of Crawford had acquired title and expended their money upon the faith of the presumption which arose from the record, had thereby divested himself of the privilege of insisting upon his position as a surety, in contravention of the equitable rights which had supervened. So, here, Stewart and Andrew were content to stand for six years and more upon the presumptions which arose from the judgment record, until the grantees of Mrs. Thomas acquired title, and expended a sum for improvements sufficient to justify the redemption of the sale upon which their title rested.

As was pertinently said in the case above referred to, if they are now to be regarded as sureties, they can not be regarded as having acted in good faith towards those who were investing their money on the faith of the record.

The purchasers, although they were bound to know that Wingate had not been made a party to the McQueen foreclosure, and that he had, therefore, the right to redeem, had, nevertheless, the right to assume that if two of the three jointly liable to pay the judgment were solvent, the creditor might collect the debt from them, and thus discharge the judgment, and with it the right of redemption. This is what happened, and they can not now be disappointed.

The distinction between the present case and *Catterlin v. Armstrong*, 101 Ind. 258, and cases of that class, in which

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the rights of junior mortgagees whose mortgages were of record were involved, is obvious.

Upon the facts found the conclusions of law should have been in favor of the appellants.

The judgment is therefore reversed, with costs, with directions to the court below to restate its conclusions of law and render judgment for the appellants in accordance with this opinion.

Filed Nov. 13, 1888; motion to modify mandate overruled January 23, 1889.

No. 14,265.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY v. HILL,
ADMINISTRATRIX.

RAILROAD.—*Danger Signals.—Contributory Negligence.*—Although a railway company may be negligent in failing to give proper warning of the approach of a train, a person injured can not, nevertheless, recover unless it be affirmatively shown that he was free from contributory negligence.

SAME.—*Negligence per se.*—If, by looking, he could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is held negligence *per se*.

From the Clark Circuit Court.

J. K. Marsh and *W. H. Watson*, for appellant.

F. B. Burke, for appellee.

ZOLLARS, J.—David Hill received injuries, in a collision with one of appellant's engines, from which he died. This is an action by the administratrix to recover damages from the railway company.

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194 289
197 148

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128 100
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131 204
131 431
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136 43
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117 56
141 99
142 275
143 385
143 412
143 453
143 526

117 56
144 457

117 56
148 58
149 67

117 56
164 100

117 56
162 378
162 447

117 56
171 172

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The grounds upon which appellant's counsel contend that the judgment ought to be reversed are, that the complaint is insufficient; that the trial court erred in the giving and refusal of instructions; and that the verdict and judgment are not sustained by sufficient evidence.

Upon the view we feel constrained to take of the case, it will not be necessary for us to examine the first two grounds thus urged.

The undisputed facts in the case, as shown by the evidence, are these: The Ohio and Mississippi Railway, and the Jeffersonville, Madison and Indianapolis Railway, cross at right angles in the city of Jeffersonville. Parallel with the Ohio and Mississippi Railway is Illinois avenue, a public street. That street at the time of the injury complained of, and at this time, so far as shown, was, and is, unworked, and untravelled by vehicles. The two railways are connected by a double tracked "Y." The tracks of the "Y" were so separated that persons might walk between them. They crossed Illinois avenue diagonally, and upon a grade of some three or four feet above the surface of the balance of the street. It had been customary for years for the Jeffersonville, Madison and Indianapolis Railway Company to bring freight cars over from Louisville on its main track, and throw them in upon the "Y" to be taken up by the Ohio and Mississippi Railway Company and removed to its main track and placed in its trains. That was done by means of a switch engine passing back and forth over the "Y." It had for a long time been customary for that engine to be upon the "Y" at different hours in the day, to there avoid and take out the freight cars thus thrown in by the Jeffersonville, Madison and Indianapolis Railway Company, and especially in the evenings.

Hill, the decedent, had lived on Illinois avenue for about thirteen years, just opposite the point where the "Y" tracks crossed the avenue, his house being not more than twenty-five or thirty feet from the railroad. He had knowledge of

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the custom of the railway company in the use of the switch engine upon the "Y" tracks in the removal of cars thrown in upon those tracks. When cars were thus being brought over by the Jeffersonville, Madison and Indianapolis Railway Company and thrown in upon the "Y" tracks, its passenger trains could not go out over the main track. On the evening of the injury to Hill, one of its passenger trains had pulled in upon the "Y" track farthest from his house, and was there awaiting the throwing in of the freight cars and the consequent clearing of the main track of obstructions. The train was composed of an engine, a baggage car and three coaches. It had so far passed over Illinois avenue that the rear end of the rear coach was about opposite to Hill's house. The steam escaping from the engine was making some noise. Some time after six o'clock, the switch engine had come upon the "Y" track nearest to Hill's house, and had stopped beyond the crossing of the avenue some little distance, and was also awaiting the throwing in of the freight cars. The rear end of the switch engine was towards the street crossing. Those in charge of the engine, and others, testified that it was lighted up by a head-light. Others testified that they did not see such a light upon the engine, either before or at the time of the collision with Hill. For the purposes of this decision, we may assume that this negative and positive testimony makes a conflict in the evidence, and that, because of that conflict, the evidence should be regarded as showing that the engine was without a head-light. Such were the positions of the train and switch engine when Hill reached his house in the evening, and when he left it immediately before his collision with the switch engine, on the first day of September. After having had his supper, he left the house and passed out through his gate on his way towards the "Y" tracks. It was then after night, but the switch engine could readily be seen from his house, and on his way to the "Y" tracks. Before reaching those tracks, the Jeffersonville, Madison and Indianapolis Railway Com-

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pany threw a freight car in upon the "Y" track nearest to his house, and in order to avoid a collision with that moving car, the switch engine was started and moved across Illinois avenue. Just as it reached that avenue, Hill stepped upon the track, and came in collision with it, and received the injuries from which he died.

There is evidence tending very strongly to show that he was not struck by the engine, but by the Jeffersonville, Madison and Indianapolis freight car so thrown in upon the "Y," and which was following close upon the switch engine. But as there is a conflict in the evidence, and as it seems to be conceded that to justify a recovery by appellee it should be found that Hill was struck by the switch engine, we adopt that conclusion as an established fact in the case.

Those in charge of that engine, and others, testified positively that when it was started the whistle was sounded and the bell rung, and that at the time, and prior to being started, the escaping steam was making quite a noise. Others testified that they neither heard a bell nor whistle. Again, adopting the view of the evidence most favorable to the appellee, it may be assumed that the switch engine was started without sounding the whistle or ringing the bell.

As before stated, the switch engine, before and at the time it started, could readily be seen from Hill's house, and in passing over the short distance from the house to the tracks. His daughter, who remained in the house, both saw and heard it start on its way across the avenue. His wife, who was in the yard at the house, heard the engine start and saw it when it struck him.

Upon the foregoing facts there can be no recovery in favor of appellee. To hold that there can be would be to overthrow a long and settled line of cases in this court, which are supported by the cases elsewhere and by the law writers. The failure to sound the whistle and ring the bell upon the switch engine before starting across the avenue may be regarded as negligence on the part of appellant, but such neg-

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ligence on its part is not sufficient of itself to authorize a recovery on the part of appellee. In order to such a recovery, it must further appear from the evidence, that, in going upon the track, Hill was not guilty of negligence which contributed to his injury. The evidence does not show that he was free from such contributory negligence. On the other hand, following the rule laid down by the cases and law writers, the evidence affirmatively shows that he was guilty of negligence which contributed to his injury. If before, and at the time of going upon the track, he had looked and listened, he could have both seen and heard the switch engine when it started, and as it moved on its way over the avenue. Others, much farther away, and out of all danger, and without any incentive to thus look or listen, both saw and heard it when it started and as it moved to and over the avenue.

Citing a multitude of cases in support of the text, and which do fully support it, Mr. Beach, in his work on Contributory Negligence, p. 191, section 63, thus states the rule: "When one approaches a point upon the highway, where a railway track is crossed upon the same level, it is his plain duty to proceed with caution, and if he attempts to cross the track, either on foot or in a vehicle of any description, he must exercise, in so doing, what the law regards ordinary care under the circumstances. He must assume that there is danger, and act with ordinary prudence and circumspection upon that assumption. The requirements of the law, moreover, proceed beyond the featureless generality that one must do his duty in this respect, or must exercise ordinary care under the circumstances. The law defines precisely what the term 'ordinary care under the circumstances' shall mean in these cases. In the progress of the law in this behalf, the question of care at railway crossings, as affecting the traveller, is no longer, as a rule, a question for the jury. The quantum of care is exactly prescribed as matter of law. In attempting to cross, the traveller must listen for signals, no-

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tice signs put up as warnings, and look attentively up and down the track. A multitude of decisions of all the courts enforce this reasonable rule. * * * * If a traveller, by looking, could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is held negligence *per se*."

Our cases support the rule as thus stated and laid down in the numerous cases cited, to its full extent. We do not think that it would be profitable to do more than cite some of the cases, without further comment. *Bellefontaine R. W. Co. v. Hunter*, 33 Ind. 335; *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31; *Indiana, etc., R. W. Co. v. Greene*, 106 Ind. 279; *Belt R. R., etc., Co. v. Mann*, 107 Ind. 89; *Indiana, etc., R. W. Co. v. Hammock*, 113 Ind. 1.

Appellee's counsel seem to think that the present case does not fall within the rule laid down by the above authorities, by reason of the passenger train having been upon the track of the "Y" farthest from his house. That circumstance, in our judgment, can make no difference. Hill knew that it was the custom of the railway company to bring the switch engine in upon the "Y," to take out cars thrown in by the Jeffersonville, Madison and Indianapolis Railway Company. He knew that it would start as soon as such cars might be thus thrown in. Before and at the time he approached the track, the switch engine was in full view, and but a short distance away. The track upon which it was standing was the first one to be reached by him, if, indeed, he intended to cross the other at all, and that was the point of danger. He either did not look to discover the switch engine and its location, or carelessly and heedlessly went upon the track without any precaution for his safety.

There are cases where there may be a recovery, although the plaintiff may have gone upon the track without looking and listening for approaching trains, as the above stated rule

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requires, as, for example, where, by the negligence or misconduct of the railway company, another is suddenly put in peril, and when in such peril, and acting under the impulse of apparently well-grounded fear, seeks to escape; or where the railway company, acting through its servants, by its own negligent or wrongful acts or omissions, throws the plaintiff off his guard; or where it so acts as to invite him to go upon the track, or to create the impression that there is no danger, when in fact there is. Beach Cont. Neg., p. 71, section 23; *Pennsylvania Co. v. Marion*, 104 Ind 239.

This case does not fall within any of the exceptions to the general rule. Hill was not put in peril by any negligence or misconduct on the part of the railway company.

He was upon safe ground, and, with his eyes open, voluntarily walked into danger. He was in no way invited to go upon the track; nothing was done by the railway company in any way calculated to create the impression that there was no danger, nor was the railway company guilty of any negligent or wrongful acts or omissions calculated to throw him off his guard. The passenger train was upon the farther track, but it was there rightfully, and not by any neglect or wrongful act. It had been there many times before, awaiting the clearing of the main track by the throwing in of the freight cars. It could not move out until after the freight cars should be thrown in upon the track of the "Y," upon which the switch engine was standing. The track upon which Hill was about to enter, and the switch engine upon it, in full view, and in close proximity, were warnings to him of the dangers which immediately beset him. He was in no danger from the train upon the other track; first, because he had not reached it, and second, because, so far as shown, he had no purpose to go upon or across it.

Without further extending the opinion, we feel constrained to hold that the verdict and judgment are not sustained by sufficient evidence, and to reverse the judgment for that

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reason. It is not a case of conflicting evidence, but a case where there is a lack of evidence.

Judgment reversed with costs.

Filed Nov. 10, 1888; petition for a rehearing overruled Feb. 2, 1889.

No. 13,085.

CRAWFORD ET AL. v. HAZELRIGG.

MORTGAGE.—To Indemnify Endorser.—Married Woman.—Inchoate Interest.—

Where a married woman has joined her husband in the execution of a mortgage on his real estate to indemnify an endorser upon the note of her husband, or of him and others, she may, in a suit to foreclose the mortgage, avail herself of any valid legal or equitable defence to protect her inchoate interest in the real estate.

SAME.—Promissory Note.—Alteration.—Extension of Time of Payment.—Release of Wife's Inchoate Interest.—Where, after the execution of an indemnifying mortgage by a husband and wife to secure an endorser for the husband and others, the note upon which the mortgagee is endorser is, with his consent, but without the consent of the wife, so changed that one of the makers is released from liability, the inchoate interest of the wife is fully discharged from the lien of the mortgage; but the mere extension of the time of payment for a definite time and for a valuable consideration, all the parties to the note, including the indorser, consenting, will not have that effect.

SAME.—Disability of Married Woman.—Executory Contract.—Under the law of this State, as it was in 1877, a married woman could not bind herself by an executory contract, and hence a provision in a mortgage in which she joined, that "the mortgagors expressly agree to pay the sum of money above secured and hold the mortgagee harmless therefrom," was not binding upon her.

SAME.—Statute of Limitations.—Where a mortgage in suit contains an express agreement by the mortgagor to pay the sum of money secured thereby, an answer setting up the six years clause of the statute of limitations in bar of the suit, is bad on demurrer for the want of facts.

From the Decatur Circuit Court.

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147	491
117	68
162	276

117	63
168	127
168	129
168	135

117	63
170	674

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*J. D. Miller and F. E. Gavin, for appellants.**J. K. Ewing and C. Ewing, for appellee.*

Howk, C. J.—This was a suit by appellee, Hazelrigg, as plaintiff, to foreclose a certain indemnifying mortgage alleged to have been executed to him by the appellants, William R. and Emma P. Crawford, on certain parcels of real estate in Decatur county, Indiana. The mortgage sued on was dated and acknowledged on the 23d day of October, 1877, and was recorded in the proper recorder's office on the 31st day of August, 1878. It was stipulated in such mortgage, that it was given "to secure and hold the said Hazelrigg harmless from all liability as endorser on a certain promissory note for the sum of \$2,300, dated October 1st, 1877, due in four months after date, payable to the Citizens' National Bank of Greensburg, Ind., with ten per cent. interest from maturity and providing for five per cent. attorney's fees, signed by the said William R. Crawford, Hazelrigg Carriage Company, Hazelrigg Carriage Works, Newton Hazelrigg and J. F. Hazelrigg, and endorsed by the said mortgagee; and the mortgagors expressly agree to pay the sum of money above secured, and hold the said mortgagee harmless therefrom, without relief from valuation or appraisement laws."

In his complaint, plaintiff alleged, among other things, that at the date of said note and mortgage he was, and at all times since had been, solvent and able to pay said debt, and that the other parties to said note had wholly failed to pay the same or any part thereof, although it had become due in four months after its date; that, at the commencement of this suit, all the parties to said note were insolvent, except the plaintiff and defendant William R. Crawford; that said Crawford had left the State of Indiana and was then a resident of the State of Ohio, and had no property within this State subject to execution, except the last two parcels of real estate described in said mortgage; and that the parcel of real estate first described in said mortgage, was

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encumbered by, and had been sold to satisfy, a mortgage prior to the mortgage sued on herein. Wherefore, etc.

The cause was put at issue and submitted to the court for final hearing; and, at defendants' request, the court made a special finding of facts herein, and thereon stated its conclusion of law in favor of the plaintiff. Over defendants' exceptions to its conclusion of law, the court rendered its final judgment for plaintiff and decreed the foreclosure of the mortgage in suit, etc.

In this court, defendant Emma P. Crawford has separately assigned errors which call in question the rulings of the trial court in sustaining plaintiff's demurrers to each of the first and second paragraphs of her separate answer. In their brief of this cause, defendants' learned counsel have discussed together the questions presented here by these alleged errors, and we will consider and decide such questions in the same manner.

In the first paragraph of her separate answer, defendant Emma P. Crawford alleged that she then was, as she was at and prior to the execution of the mortgage sued on, a married woman, being the wife of her co-defendant, William R. Crawford; that no part of the indebtedness said mortgage was given to secure was her individual debt or the individual debt of her said husband, but was the debt of a firm of which he was a member; that, after the execution of said mortgage, to wit, on the — day of —, 187—, the note described in such mortgage was renewed by the several makers thereof, except John F. Hazelrigg, who, by and with the plaintiff's consent, and without the knowledge and consent of said defendant, failed to sign said note as a maker. Wherefore she said that, the debt having been altered and changed without her consent, she was released, and she asked that the title to her interest in said real estate might be quieted.

In the second paragraph of her separate answer, said defendant alleged substantially the same facts as in the first

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paragraph, except that she averred in such second paragraph, that, after the execution of the mortgage sued on, the payment of the note intended to be secured thereby was, for a valuable consideration, and without her knowledge and consent, by the plaintiff and her co-defendant, and the other members of the firms of the Hazelrigg Carriage Co. and the Hazelrigg Carriage Works, extended for the period of ninety days.

The fundamental question presented for our decision by the alleged errors of the court below, in sustaining plaintiff's demurrers to the first and second paragraphs of Emma P. Crawford's separate answer herein, may be thus stated: Where a married woman has joined her husband in the execution of a mortgage on his real estate to indemnify and save harmless an endorser or surety upon the note or debt of her husband, or of him and others, in the event of a suit to foreclose such mortgage may she avail herself of a valid legal or equitable defence to protect, or prevent the sale of, her inchoate interest in such real estate, under such mortgage, should she survive her husband, or should his title to the real estate become absolute and vested in the purchaser at a judicial sale thereof under the mortgage? We are of opinion that this question must be answered in the affirmative. It is true, as we have often decided, that where a wife joins with her husband in the execution of a mortgage on his real estate, such mortgage as to the wife is not a "contract of suretyship" within the prohibition of section 5119, R. S. 1881, and is not void as to her for that reason. *Leary v. Shaffer*, 79 Ind. 567; *Dodge v. Kinzy*, 101 Ind. 102; *Cupp v. Campbell*, 103 Ind. 213; *Tennison v. Tennison*, 114 Ind. 424.

But in such case, we have also held, and correctly so, we think, that the wife occupies, as to her inchoate interest in the mortgaged real estate of her husband, a relation so far analogous to that of a surety as that she was entitled in equity to an order directing that the two-thirds of mortgaged real estate

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should be first sold to satisfy the debt secured by the mortgage. *Leary v. Shaffer, supra*. In the case last cited, it was held that the inchoate interest of the wife in the lands of her husband was "a substantive right, carrying with it some equities," and that the equities were "of strength sufficient to entitle her to have an order incorporated in the decree directing an offer to be first made of the husband's interest in the land." It has always been held by this court, that the provisions of our statutes for the wife in the lands of her husband were a substitute for dower under the common law; and dower was defined to be "a legal, an equitable and a moral right." *Noel v. Ewing*, 9 Ind. 37; *McCord v. Wright*, 97 Ind. 34. It must be that the wife is entitled to invoke the aid of a court of equity in the defence of any suit, the object of which is to subject to sale her inchoate interest in the lands of her husband for the payment of his debt.

In the case in hand, if the facts stated in the first paragraph of Emma P. Crawford's separate answer are true, and, as they are well pleaded, their truth is admitted by plaintiff's demurrer, one of the makers of the note described in the mortgage sued on, by and with the plaintiff's consent, and without the knowledge and consent of said Emma P. Crawford, was released and discharged from liability for the note and debt secured by such mortgage. The note described was the principal thing, of which the mortgage sued on was merely an incident. To secure the payment of that note, and of the debt evidenced by that note, and to indemnify and save harmless the plaintiff, as endorser of that note, Emma P. Crawford, the wife, joined with her husband in the execution of the mortgage in suit upon his real estate. In legal effect, she thereby contracted and agreed with the plaintiff, that, if that note were not paid by any of the makers thereof, her inchoate interest, her legal, equitable and moral right in and to the mortgaged lands, might be sold and forever barred, for the indemnity of the plaintiff, under the decree of a competent court foreclosing such mortgage. She had the right

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to insist upon a strict construction of her contract and agreement to and with the plaintiff. If it be true, as alleged, that, after the execution of the mortgage sued on, the note therein described, with the consent of the mortgagee, the plaintiff herein, and without the knowledge and consent of defendant Emma P. Crawford, was so changed and altered, by the renewal thereof or otherwise, as that one of the makers of such note, John F. Hazelrigg, was released from liability thereon or for the debt evidenced thereby, then it must be held, we think, that the inchoate interest of said Emma P. Crawford—her “substantive right”—in the mortgaged real estate was thereby discharged and released from the lien of such mortgage, as fully and effectually as though she had never joined her husband in the execution thereof.

Under the law of this State, as it existed at the time of the execution of the mortgage sued on, on the 23d day of October, 1877, a married woman was protected by the disabilities imposed on her by the common law, and was incapable of binding herself by an executory contract. *Thomas v. Passage*, 54 Ind. 106; *American Ins. Co. v. Avery*, 60 Ind. 566; *Liberty Tp. Draining Ass'n v. Watkins*, 72 Ind. 459; *Haas v. Shaw*, 91 Ind. 384, on p. 387; *Frazer v. Clifford*, 94 Ind. 482.

We need not argue, therefore, for the purpose of showing that said Emma P. Crawford was in no manner bound by the contract contained in the mortgage sued on, whereby “the mortgagors expressly agree to pay the sum of money above secured and hold the said mortgagee harmless therefrom,” etc. She was incapable of binding herself by such contract, at the time of its execution. For the reasons given, we are of opinion that the facts stated by said Emma P. Crawford, in the first paragraph of her separate answer herein, were sufficient to constitute a perfect and complete defence to plaintiff's action to foreclose the mortgage sued on as against her, and that the demurrer to that paragraph ought to have been overruled.

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The alleged error predicated upon the ruling of the court below in sustaining plaintiff's demurrer to the second paragraph of said Emma P. Crawford's separate answer herein, presents a very different question. That paragraph of answer proceeds upon the theory that the extension of the time of payment of a promissory note for a definite period of time, upon an agreement between the maker and holder for a valuable consideration, will release an endorser or surety, who does not consent to such extension, from all liability on the note. That theory is right, and accords with the law of this State. *Prather v. Young*, 67 Ind. 480, and cases cited.

It was not averred in the second paragraph of answer, as in the first paragraph, that there had been a change in the makers of the note described in the mortgage sued on, or that one of such makers, with plaintiff's consent, but without the knowledge or consent of said Emma P. Crawford, had been discharged and released from the debt evidenced by such note, by the taking of a new note in renewal thereof, to which new note such maker was not a party. The note described in the mortgage sued on was apparently the joint and several note of all the makers thereof, and plaintiff was the only endorser or surety thereon. Under the averments of the second paragraph of said Emma P. Crawford's answer, it is certain that plaintiff was not released from liability as an endorser of the note by the extension of the time of its payment, for it was alleged that plaintiff was a party to such extension. Defendant Emma P. Crawford was not a party to such note, in any capacity, and the mere extension of the time of its payment, as alleged, did not affect her or her inchoate rights in the mortgaged property, in any manner or to any extent. The demurrer to the second paragraph of her separate answer was correctly sustained.

Defendant William R. Crawford has separately assigned here as error the ruling of the court below in sustaining plaintiff's demurrer to the second paragraph of his separate answer herein. In that paragraph of his answer said defendant al-

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leged that the cause of action mentioned in the complaint herein did not accrue within six years before the commencement of this suit. We are of opinion that the court did not err in sustaining plaintiff's demurrer to this paragraph of answer.

Plaintiff's action is founded on the mortgage described in his complaint herein. If that mortgage had been one of indemnity merely, if it had not contained a covenant or express agreement by the mortgagor, William R. Crawford, "to pay the sum of money" secured thereby, then the facts stated in the second paragraph of his answer would have been sufficient to withstand the demurrer thereto, and, if sustained by the evidence, to have constituted a complete and absolute bar to plaintiff's action. *Lilly v. Dunn*, 96 Ind. 220, and cases there cited; *Nichol v. Henry*, 98 Ind. 34; *Post v. Losey*, 111 Ind. 74.

Where, however, as in the case under consideration, the mortgage sued on contains a covenant or express agreement by the mortgagor to pay the sum of money secured thereby, it is settled by our decisions that an answer setting up the six years clause of our statute of limitations as a defence in bar of the action, is clearly bad on demurrer thereto for the want of sufficient facts. *Aetna Life Ins. Co. v. Finch*, 84 Ind. 301; *Lilly v. Dunn*, *supra*; *Nichol v. Henry*, *supra*; *Catterlin v. Armstrong*, 79 Ind. 514; *Bridges v. Blake*, 106 Ind. 332.

The demurrer to the second paragraph of William R. Crawford's answer, therefore, was correctly sustained.

Each of the defendants has assigned error upon the court's conclusion of law on its special finding of facts; but, as the judgment must be reversed for the error already pointed out, we need not and do not consider the other errors of which defendants complain.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrer to the first paragraph of Emma P. Crawford's separate answer, and for further proceedings not inconsistent with this opinion.

Filed Nov. 26, 1888; petition for a rehearing overruled Jan. 23, 1889.

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No. 14,519.

SONDHEIM ET AL. v. GILBERT, ASSIGNEE.

CONTRACT.—*Sale.*—*Future Delivery.*—*Margins.*—A contract for the sale and future delivery of a commodity which may be procured in the market at the proper time, is valid, if it is the intention of the parties, or one of them, that the commodity shall actually be procured and delivered, and this is so, although money may be deposited, as a margin, to secure performance or as indemnity against loss.

SAME.—*Speculative Transactions.*—*Void Contracts.*—*Public Policy.*—If no delivery is contemplated, and the intention of the parties is merely to speculate on the rise or fall of the market, and adjust the account between them by paying or receiving the difference between the contract and current price, the contract is against public policy and void.

PROMISSORY NOTE.—*Innocent Holder.*—*Wagering Speculations.*—*Margins.*—A negotiable note executed for the purpose of paying margins in a speculation in cotton futures, although void as between the parties on common law principles, is valid in the hands of a third person who takes it before maturity, for value and without notice of the purpose for which it was executed, unless declared to be void by statute. For statutes held not to invalidate such a note, see opinion.

SAME.—*Lex Loci Contractus.*—Where a note is executed and made payable in another State, where the transactions of the parties who put the note in circulation are to be carried on, the law of that State must be looked to in determining its validity; and if valid there in the hands of an innocent holder, it will be enforced in this State, unless declared void by our statutes.

SAME.—*Enforcement in this State.*—Commercial paper executed and issued in New York in the course of a speculation in cotton options in that State, will be enforced in this State in the hands of an innocent holder, neither the statutes of that State nor of this State declaring such paper void in hands of such a holder.

SAME.—*Partnership.*—*Commercial Paper Issued by One Partner.*—When a partnership is engaged in a course of business in which the use of commercial paper is appropriate, the firm is liable upon such paper in the hands of a *bona fide* holder, when issued in the firm name by one of its members, notwithstanding it may have been issued in violation of his duty, without the knowledge or consent of the other members.

From the Vanderburgh Circuit Court.

117	71
118	504
118	588
119	330
119	518
123	568
117	71
126	268
126	360
117	71
128	428
117	71
131	270
117	71
149	146
117	71
166	511

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*D. B. Kumler, G. F. Denby and J. Ullman, for appellants.
A. Gilchrist, C. A. DeBruler, A. C. Harris, W. H. Calkins
and W. C. Wilson, for appellee.*

MITCHELL, J.—This was a suit by Samuel and Henry P. Sondheim, partners doing business under the firm name of Sondheim Brothers, against John Gilbert, assignee of Miller Brothers, insolvents, to establish a claim against the partnership estate of the latter in the hands of the assignee.

It is averred in the complaint that Conrad and Jacob Miller had theretofore been partners doing a general mercantile business in the city of Evansville, under the firm name of Miller Brothers, and that, on the 11th day of December, 1885, they executed their promissory note, payable to themselves in six months after date, in the city of New York, for \$7,264.11. It is averred that Miller Brothers afterwards negotiated the note by endorsement in blank, and that, after it passed through the hands of divers persons, the plaintiffs became the owners of the note before its maturity, having paid therefor the full face value, without any notice whatever of the consideration for which it was given. The law of the State of New York, the note having been executed and made payable in that State, is set out in the complaint, and it appears therefrom that notes, drawn in the form of that sued on, are negotiable according to the custom and law of merchants.

The case was disposed of in the court below by a ruling on a separate demurrer to certain answers, which set up substantially the following facts, viz.: That at the date of the execution of the note, the Miller Brothers were engaged in the dry goods business in the city of Evansville, and that Conrad Miller, one of the members of the firm, made an agreement with Morris Ranger, without the knowledge or consent of Jacob Miller, the other member of the firm, that they, Ranger and Conrad Miller, should engage on joint account in speculating in cotton futures upon the New York

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cotton exchange; that they agreed to buy, on joint account, fifty thousand bales of cotton to be nominally delivered during some months in the future; and that it was understood and agreed between them that no cotton was to be actually bought, sold, received or delivered, but that, after making pretended purchases, if the price should advance or decline on the New York cotton exchange, there was to be a settlement of the differences accordingly, as the current price might be higher or lower than that nominally agreed upon at the time of the pretended purchase.

It is averred that, in pursuance of the foregoing arrangement, Conrad Miller executed the note sued on, together with a large number of other notes, without the knowledge or consent of his partner, and that the notes so executed were endorsed in blank by Conrad Miller, in the name of Miller Brothers, and placed in the hands of Ranger, to be used by him solely for the purpose of paying or securing losses or margins which were required to be put up in the contemplated transactions, which it is alleged were to be merely gambling or wagering speculations in cotton futures, and that the note sued on was made and endorsed for no other consideration whatever.

In some of the paragraphs of answer which set up substantially the foregoing facts, certain sections of a statute against gaming, and affecting certain contracts and securities, alleged to be in force in the State of New York, are set out.

The court overruled the demurrer to the answers, and, the plaintiffs declining to reply, judgment was rendered disallowing the claim. The plaintiffs prosecute this appeal, and assign for error the ruling of the court in overruling the demurrer to the defendant's answers.

Upon a determination of the propriety of this ruling the judgment of the court below must either be affirmed or reversed.

Whether or not contracts, notes, bills and other securities, growing out of transactions similar to those contemplated by

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Ranger and Miller, as disclosed by the facts admitted by the demurrer to the answers, are valid and collectible, has been the subject of much consideration in the courts. As related to legitimate commercial transactions, and the recognized methods of conducting the mercantile business of the day, the importance of the question can not readily be overestimated.

Formerly the rule was that articles which had no actual or potential existence at the time of the contract, were not the subjects of sale, but this was found to be such an impediment to commerce that some relaxation in the rule was deemed necessary. It is now established upon indisputable authority that a contract for the sale and future delivery of a commodity of a designated kind or class, which the seller does not own, and which has at the time no actual existence, but which may be supplied by purchase in the market at the proper time, is a valid contract, provided it is the intention of the parties, or of one of them, at the time the contract is made, that the commodity shall actually be procured by the seller, and supplied to the purchaser at or before the maturity of the agreement. *Cobb v. Prell*, 22 Am. Law Reg. (N. S.) 609, and note; *Crawford v. Spencer*, 92 Mo. 498 (1 Am. St. Rep. 745, and note).

In such a case it does not invalidate the transaction that the parties, or either of them, may have deposited money, as a margin, to secure the performance of the contract, or as indemnity against loss in case one or the other fails to consummate his agreement. As has been said, "present ownership is of less consequence than the intention of the contracting parties." *Cockrell v. Thompson*, 85 Mo. 510; *Wall v. Schneider*, 59 Wis. 352 (48 Am. Rep. 520); *Whitesides v. Hunt*, 97 Ind. 191 (49 Am. R. 441); *Gregory v. Wendell*, 39 Mich. 337 (33 Am. Rep. 390).

While contracts for the sale of property to be delivered in the future are valid, where the parties, or either one of them, actually contemplate a delivery of the subject-matter of the

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contract, yet if, under the guise of a contract which has the appearance of validity upon its face, the real intention is merely to speculate on the rise or fall of the market, without any purpose that any property shall be delivered or received, but with the understanding that at the appointed time the account is to be adjusted by paying or receiving the difference between the contract and the current price, then the whole transaction is illegal, as against public policy, and falls under the condemnation of the law. *Whitesides v. Hunt, supra*, and cases cited; *Irwin v. Williar*, 110 U. S. 499.

The facts stated in the answer make it clear that the transactions contemplated by Morris Ranger and Conrad Miller were not the actual purchase and acceptance of cotton, but mere speculative wagers upon the price of that commodity from time to time as it might be quoted on the New York cotton exchange. This was an agreement to engage in mere wild speculation in the nature of gambling or wagering upon the fluctuations in the price of cotton. Such transactions demoralize and embarrass legitimate trade, and are subversive of all correct business principles, destructive of commercial integrity and morality, and result directly or indirectly in most of the bankruptcies, defalcations, and forgeries which startle and distract business circles. Between the parties to such a transaction and all others who participate in the specific illegal design, with the intention of aiding in its execution, so as to become principals or accessories thereto, any contract or other security resulting therefrom will be wholly invalid. But in the absence of a statute in direct terms prohibiting transactions of the character of that in question, and declaring them unlawful, or expressly declaring promissory notes growing out of such a transaction invalid, while the courts will on general common law principles declare such notes invalid between the parties and those who were accessory to the illegal act, yet in order to invalidate a note or other security in the hands of one who advanced money, which the borrower intended to and did

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employ in carrying on an illegal enterprise, it has been held that it was not enough to defeat a recovery that the lender knew the borrower's purpose. He must have been in some way implicated as a confederate in the specific illegal design under contemplation. It must have been a part of the contract, or there must have been in some way such a combination of intention between the lender and borrower that the money furnished should be used in aid of and to promote the unlawful enterprise, as that the former became *particeps criminis*. *Tyler v. Carlisle*, 79 Maine, 210; *Waugh v. Beck*, 114 Pa. St. 422; *Tracy v. Talmage*, 14 N. Y. 162; *Arnot v. Pittston, etc., Coal Co.*, 68 N. Y. 558.

Thus it was held in *Bickel v. Sheets*, 24 Ind. 1, that a contract for the sale of property which the purchaser intended to use for gaming purposes, in violation of a statute, was not void, although the seller was informed at the time of the sale of the purpose for which the property was to be applied. *Cummings v. Henry*, 10 Ind. 109; *In re Lister*, 25 Eng. Rep. (Moak) 647, and note; *Feineman v. Sachs*, 33 Kan. 621; *Distilling Co. v. Nutt*, 34 Kan. 724; *Fisher v. Lord*, 63 N. H. 514; *Parsons Oil Co. v. Boyett*, 44 Ark. 230. There must be knowledge of and participation in the illegal or immoral purpose.

It is not necessary, however, that we pursue this feature of the case further, as it is conceded upon the record that the note in suit came to the hands of the plaintiffs in the due course of trade, before maturity, for value and without notice of the purpose for which it was executed or drawn. In order, therefore, to uphold a judgment which invalidates commercial paper in the hands of innocent holders, such as plaintiffs are conceded to be, it is essential that a statute should be shown governing the case, which in direct terms declares that transactions such as those here involved are unlawful and that notes given under the circumstances exhibited by the facts in this case are absolutely void.

The principle may be considered as well established, that

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when a statute in express terms pronounces contracts, notes, bills, securities and the like, resulting from or growing out of wagering or gambling transactions, which are prohibited by statute, absolutely void, no recovery can be had thereon, and the doctrine that transactions which a statute in direct terms declares to be unlawful, can not acquire validity by the transfer of commercial paper based thereon, which is also under direct legislative denunciation, is fully supported by authority. *New v. Walker*, 108 Ind. 365; *Thompson v. Bowie*, 4 Wall. 463; *Vallett v. Parker*, 6 Wend. 615; 1 Daniel Neg. Inst., sections 197, 807. In such a case the note will be declared void in the hands of an innocent holder, in pursuance of the peremptory words of a statute which embraces in its terms the contract or obligation under consideration. *Town of Eagle v. Kohn*, 84 Ill. 292.

The authorities justify the statement that a defendant may insist upon the illegality of the contract or consideration, notwithstanding the note is in the hands of an innocent holder for value, in all those cases in which he can point to an express declaration of the Legislature that the illegality insisted upon shall make the security, whether contract, bill or note, void. But, unless the Legislature has so declared, then, no matter how illegal or immoral the consideration may be, a commercial note in the hands of an innocent holder for value will be held valid and enforceable. *Hatch v. Burroughs*, 1 Wood, 439; *Town of Eagle v. Kohn*, *supra*; *Third Nat'l Bank v. Tinsley*, 11 Mo. App. 498; *Third Nat'l Bank v. Harrison*, 3 McCrary, 316 (10 Fed. Rep. 243); *Edwards v. Dick*, 4 B. & Ald. 212; *Day v. Stuart*, 6 Bing. 109; *Chitty Bills*, * 92; 2 Randolph Com. Paper, section 511.

It is argued, however, in support of the ruling below, that because the note sued on was negotiated in consideration of money advanced with which to prosecute a wagering or gambling speculation, it is, nevertheless, void in the hands of an innocent holder within the provisions of section 4950, R. S. 1881, which declares, in effect, that all notes, bills, etc.,

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when the whole or any part of the consideration thereof shall be for money or other valuable thing won on the result of any wager, or for repaying money lent, at the time of such wager, for the purpose of being wagered, shall be void.

The note in suit having been executed and made payable in the State of New York, and it appearing that the alleged illegal transactions contemplated by the parties concerned in issuing and putting the note in circulation were to be engaged in and consummated in the State of New York, the law of that State must be looked to primarily in determining the validity of the contract; the rule in that respect being, that a contract, valid by the law of the State in which it is made and is to be performed, is valid and enforceable everywhere, unless it is clearly contrary to good morals, or repugnant to the policy or positive statutes of the jurisdiction in which it is sought to be enforced. *Tilden v. Blair*, 21 Wall. 241; *Wayne County Savings Bank v. Low*, 81 N. Y. 566; *Hawley v. Bibb*, 69 Ala. 52; *Stix v. Matthews*, 75 Mo. 96; *Swann v. Swann*, 21 Fed. Rep. 299; *Burns v. Grand Rapids, etc., R. R. Co.*, 113 Ind. 169; *Flagg v. Baldwin*, 38 N. J. Eq. 219 (48 Am. Rep. 308); *Hyatt v. Bank of Kentucky*, 8 Bush, 193; *Milliken v. Pratt*, 125 Mass. 374; *Hill v. Spear*, 50 N. H. 253.

A contract, although valid where made, will not be carried into effect if, by the laws of the State whose jurisdiction is invoked, the contract which is sought to be enforced is stigmatized as unlawful, and so prohibited.

Relying upon the invalidity of the note by force of the *lex loci contractus*, the appellee has, as we have seen, pleaded the statute of the State of New York, relating to gaming contracts, in one of the paragraphs of his answer. In the other paragraph he relies upon the statute of our own State to invalidate the note. By section 8 of the New York statute, all wagers, bets, or stakes made to depend upon any lot, chance, casualty or unknown or contingent event, are declared to be unlawful, and all contracts for or on account of

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any money, property or thing in action so wagered, bet or staked are declared void. The other section declares, in effect, that all securities, any part of the consideration of which is money won by playing at any game, or by betting on the hands of such as do play at any game, or to repay any money knowingly lent at the time and place of any such play to any person so playing, shall be utterly void. This last section can have no possible application to a transaction such as that disclosed by the facts in the present case. It would be an unwarranted perversion of common and correct speech to hold that the consideration of a note which had been executed in order to obtain money with which to purchase options, or to put up as margins in cotton speculations, was money won by playing at a game or by betting on the hands of others who do play, or to repay money lent at the time and place of such play. However much dealing in options may resemble gambling or betting, and demoralizing and pernicious as it may be, it can not, with any degree of propriety, be said to be winning or losing money by playing at or betting upon any game, within the meaning of the statute. *White v. Barber*, 123 U. S. 392.

Statutes involving penal consequences can not be extended by construction so as to include acts not in terms forbidden, merely because of their resemblance to the acts prohibited, or because they may be equally demoralizing and injurious. *Shaw v. Clark*, 49 Mich. 384 (43 Am. Rep. 474).

The purpose of the Legislature in enacting the statute was to avoid securities, any part of the consideration of which was money won by playing at any game, etc. The words of a statute are not to be enlarged by intendment, so as to extend beyond the mischief contemplated, where such a construction would be injurious to innocent third persons. A statute ought not to be enlarged by mere construction, so as to permit the very persons guilty of the offence prohibited to retain money obtained contrary to the statute from third per-

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sons guilty of no violation of law whatever. *Edwards v. Dick, supra.*

The statutes against gaming, which render all wagers, bets and stakes unlawful, and avoid all contracts for or on account of any money wagered or bet, or any notes or other securities, when the whole or any part of the consideration thereof shall be for money won or lost on any game or wager, and statutes which make it a criminal offence to bet upon any game or the like, although not applicable in terms to the purchase of options, are sufficiently indicative of the policy of the law, as respects mere wagering contracts, of whatever description or name, to require the courts to pronounce all such contracts and securities invalid in the hands of those who were implicated in violating public policy by specifically aiding or directly participating in the furtherance of such transactions. They do not, however, go to the extent of destroying commercial securities in the hands of innocent holders for value, even though such securities may have had their inception in a transaction thus condemned.

In respect to section 8, above referred to, it may be said the distinction between contracts for or on account of any money, etc., wagered, bet or staked upon any game, and securities, bills, notes, etc., any part of the consideration of which shall be money won or lost by playing at any game, etc., is obvious.

The contracts mentioned are the agreements of the parties, by which they undertake beforehand to bind themselves to pay or deliver to the winner the money, property or thing wagered, bet or staked on the game or contingent event. These are declared unlawful and void, and so they are, in whosoever hands they may be found. The things in action, notes, bills, securities, etc., referred to in the other section, are the evidences of indebtedness given for money won or lost by playing at any game, or by betting on the hands of those who play, after the event, or for money knowingly lent at the time and place of such play to a person so play-

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ing, and these are declared to be utterly void, and so they are, without regard to their form or the fact that they may be in the hands of an innocent holder. *City of Aurora v. West*, 22 Ind. 88; 1 Daniel Neg. Inst., section 807; Chitty Bills, 92; *New v. Walker, supra*; *Greenland v. Dyer*, 2 Manning & Ryl. 422; 2 Randolph Com. Paper, section 511.

The note sued on does not fall within the terms of either section of the New York statute. The paper was made by, and was payable to, Miller Brothers. It was endorsed by them, or in their name, and delivered to Ranger, who advanced no consideration for it, but negotiated it to persons who took it for full value in the regular course of business, without notice. Until the paper was negotiated for a consideration it had no legal inception as a promissory note. In the hands of the parties to the illegal transactions contemplated, it was not a note given upon an illegal consideration, but it was a paper without any consideration, signed merely for purposes of accommodation. After it was negotiated it became a promissory note, the consideration of which was money advanced by persons who had no notice of the illegal purpose for which the parties contemplated using it, and who were in no way or sense parties implicated in the illegal confederacy.

Having reached the conclusion that the statutes of the State of New York do not, in terms, render void mercantile notes, executed in consideration of money, which the parties receiving the money intended to embark in gambling speculations on the stock market, it only remains that we say that the statutes of our own State, already referred to, indicate such a coincidence in the policy of both States as that the courts of this State will not hesitate to enforce the liability of a maker of a note such as that involved in the present case in the hands of an innocent holder.

It is not necessary that we should remark further upon the effect of the Indiana statute, as applied to notes growing out

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of transactions such as that under consideration, when such notes are executed and payable in this State.

It is enough to say that we are not disposed to indulge in a forced and strained construction of the language of our own statute, in order to reach the conclusion that to enforce payment of a commercial note, in the hands of an innocent holder, which is not within the inhibition of the statute of the State where the note was executed and made payable, would be either opposed to public morals or violative of the policy or law of this State.

It appears from the complaint that the note came to the hands of the plaintiffs in the usual course of business, for value, without notice of any defect in the consideration. The contention that the firm of Miller Brothers is not bound because the paper was issued by one of the partners without the consent of the other, in a matter outside the scope of the partnership business, is, therefore, unavailing.

It is quite true that paper issued in fraud of the rights of the firm, by a member of a commercial partnership, upon a consideration outside of the scope of the firm business, while it remains in the hands of one affected with notice, or in whose hands it is subject to like defences as in the hands of the payee, is not enforceable against the partnership. *Irwin v. Williar, supra*; *Graves v. Kellenberger*, 51 Ind. 66.

When, however, a partnership is engaged in a course of business in which the use of commercial paper is appropriate, the firm is liable upon such paper, in the hands of a *bona fide* holder, issued in the firm name by one of its members, notwithstanding it may have been issued in violation of his duty by one of the firm without the knowledge or consent of the other members. *First Nat'l Bank, etc., v. Morgan*, 73 N. Y. 593; *Smith v. Collins*, 115 Mass. 388; *Lindley Partnership*, 131.

These conclusions lead to a reversal of the judgment. The judgment is accordingly reversed, with costs.

Filed Nov. 27, 1888; petition for a rehearing overruled Feb. 22, 1889.

Patterson v. Rosenthal.

No. 13,468.

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146	690

PATTERSON v. ROSENTHAL.

SHERIFF'S SALE.—*Venditioni Exponas by Redemptioner.—Mortgage.—Wife's Rights.*—Where a judgment creditor redeems from a sale of a husband's property made under the foreclosure of a prior mortgage, in which the wife joined, and afterwards procures a sale to be made under his judgment on a *venditioni exponas*, and obtains a sheriff's deed to the property under the latter sale, the wife is not entitled to have one-third of the property set off to her as contemplated by section 2508, R. S. 1881, but the last sale is to be regarded, under section 773, as having been made upon the original decree, and the title acquired thereunder relates back to the date of the mortgage.

From the Fountain Circuit Court.

S. F. Wood, for appellant.

J. B. Schwin and *C. E. Booe*, for appellee.

COFFEY, J.—This was an action in the court below for the partition of real estate. The complaint filed by the appellant is substantially as follows:

The plaintiff herein complains of the defendant and says that she is the owner in fee of the undivided one-third, and the defendant, Henry Rosenthal, is the owner in fee of the undivided two-thirds, of the following described real estate in the county of Fountain and State of Indiana, to wit: Lot No. 71 in the old plat of the town of Covington; that plaintiff and defendant are tenants in common of said land, and the plaintiff is entitled to possession of her interest therein; that on the 10th day of May, 1882, George Patterson executed his promissory note to Mary A. McMahon and Elizabeth McMahon, due one year after date, for \$300, at eight per cent. interest and for attorney's fees, and at the same date he and this plaintiff, Bridget Patterson, executed a mortgage on said real estate to the payees of said note to secure the payment of the same; that at the time of the execution of

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said mortgage this plaintiff was, ever since has been, and still is, the wife of the said George Patterson; that at the time of the execution of said mortgage the said George Patterson was the owner in fee of said land; that on the 3d day of March, 1884, a judgment was rendered on said note against said George Patterson, and at the same time a decree of foreclosure was rendered on said mortgage for \$261.60 in the Fountain County Circuit Court, in favor of said McMahon and McMahon; that the said McMahon and McMahon caused a precept to be issued on said decree of foreclosure by the clerk of said court, directed to the sheriff of said county, who, by virtue thereof, advertised and sold said land according to law, on the 19th day of April, 1884, for \$304.70, to Samuel I. Snoddy, who paid said amount to said sheriff and received a sheriff's certificate of purchase therefor; that on the 25th day of August, 1883, Henry Rosenthal, Myers S. Rosenthal, and Charles S. Rosenthal recovered a judgment against the said George Patterson on an open account for the sum of \$156.58, before Edward Moran, a justice of the peace of Fountain county; that on the 28th day of August, 1883, the plaintiffs in said judgment filed in the office of the clerk of the Fountain County Circuit Court a duly certified copy of said judgment, and caused the same to be recorded on the same day in the order book of said court, and caused the same to be docketed in the judgment docket of said court; that they afterwards filed with said clerk the justice's certificate of *nulla bona* on said judgment, and caused the same to be recorded with said transcript; that on the 19th day of April, 1884, said judgment plaintiffs redeemed said land from the sheriff's sale, so made to the said Snoddy, by paying to the clerk of the said Fountain Circuit Court the amount bid therefor by the said Snoddy, together with the interest thereon, and all costs, to wit, \$304.97; that the year of redemption having expired and said property not having been redeemed by the said George Patterson, the owner thereof, nor by the plaintiff, nor by any other person authorized to

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do so, the said Rosenthal, Rosenthal and Rosenthal, redemptioners as aforesaid, having prior thereto filed the proper affidavit of the non-payment of their said judgment, did on the 20th day of April, 1885, cause an execution in the nature of a *venditioni exponas* to be issued on their said judgment to the sheriff of said county, who advertised and sold said land, by virtue thereof, on the 23d day of May, 1885, to the defendant herein, Henry Rosenthal, for the sum of \$370, who then and there paid said sum to said sheriff, and that said sheriff then and there executed to him a sheriff's deed for said property; that said land was not worth over \$500, and that the said George Patterson never at any time owned real estate worth more than \$500; that by reason of the facts herein set out, the plaintiff and defendant have acquired their respective titles to said land as herein set out and claimed; prayer for partition, etc.

The defendant demurred to this complaint, alleging as reason therefor that the same did not state facts sufficient to constitute a cause of action against him.

The court sustained the demurrer to which the plaintiff excepted, and she declining to plead further, the court rendered judgment against her for costs.

The assignment of errors in this court brings in question the action of the court below in sustaining the demurrer to the complaint above set out.

It is contended by the appellant that, under the provisions of section 2508, R. S. 1881, upon the execution of the sheriff's deed to the appellee, pursuant to the last sale of the property in controversy, one-third of the same immediately vested in her, in fee simple, as the wife of George Patterson, and that, by reason of that fact, she is entitled to partition. That section provides that "In all cases of judicial sales of real property in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute

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and vest in the wife in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute upon the death of the husband, whenever, by virtue of such sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof, his heirs or assigns, subject to the provisions of this act, and not otherwise."

As to whether the appellant, under the provisions of this statute, took one-third of the land in dispute, depends upon the construction to be placed on the statute providing for the redemption of land from sheriff's sales. It is conceded in argument that, if Snoddy had taken a deed under his purchase, the appellant would have been barred, and could claim no interest in this land; but it is contended by the learned counsel for the appellant, that, inasmuch as appellee redeemed it from that sale, the sale subsequently made was on the judgment rendered by the justice of the peace, and as that judgment did not direct that the appellant's interest in the land should be sold or barred, therefore, she took one-third of the land upon the consummation of that sale.

The section of the statute in dispute is as follows: Section 773, R. S. 1881. "If, during the year hereinbefore allowed for redemption, the real estate, or interest therein, sold by the sheriff, or any parcel or parcels thereof sold separately, shall be redeemed by any judgment creditor, as aforesaid, and remain unredeemed by the owner or part owner, or by any person claiming under them, at the expiration of such year, the last redemptioner shall be, immediately thereafter, entitled to sue out an execution, in the nature of a *venditioni exponas*, upon his judgment, by virtue of which he made his redemption. Such execution shall recite the judgment upon which the original sale was made, naming the court wherein rendered, the parties thereto, the date and amount thereof, the dates of the execution and sale, and name of the owner, the price paid by the purchaser or purchasers for the real estate, if sold in one body, or for each parcel thereof, if sold in

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parcels, or interest therein redeemed by said redemptioner, the amount paid by such redemptioner in redemption thereof, date of payment, and costs of redemption, and the judgment of said redemptioner under which his redemption was made, and amount due thereon ; which execution shall be issued to the sheriff of the county in which such real estate is situate, commanding him to sell the real estate, interest therein, or parcels thereof, redeemed by said redemptioner, to the highest bidder ; and, after paying the costs of sale, and paying to such redemptioner his redemption-money, and interest thereon at the rate of eight per cent. per annum, and his costs of redemption, and the amount of principal, interest, and costs due on his judgment, to pay the residue into the office of the clerk issuing such execution. Such real estate shall be sold upon like notice as in other cases, but without offering the rents and profits, and without regard to appraisement laws ; and, if redeemed in parcels, shall be offered in like parcels ; and the redemptioner suing out such execution shall be deemed the bidder for the amount paid by him in redemption thereof, and interest thereon at the rate of eight per cent. per annum, his costs of redemption, and the costs of sale ; and, if no one bid more, he shall be deemed the purchaser for that amount, and the sheriff shall, immediately upon the perfecting of such sale, execute to the purchaser a conveyance of the premises, which shall convey to the purchaser all the title and interest of the owner sold under the original execution. * * *

If execution upon the judgment of the last redemptioner be stayed at the expiration of the year aforesaid, or there be instalments on his judgment or decree, not then due, he shall, nevertheless, be entitled to execution, as aforesaid, for the amount due him on account of his redemption, which shall be without prejudice to his right to sue out further final process on his judgment or decree ; and any surplus remaining, after satisfying the costs of sale and amount due him on account of redemption, shall be paid to the clerk, for distribution, as hereinafter provided. Such sale shall discharge the lien of

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the judgment on which the original sale was made, and the liens of all intervening judgments and decrees."

We do not think that the redemption by appellee had the effect of satisfying the McMahon judgment and decree, as contended by the appellant. By such redemption the appellee succeeded to the rights of both McMahon and Snoddy in that decree, so far as the same operated as a lien upon the mortgaged land.

It is true that it was necessary to offer the land for sale again, but the time for redemption continued to run against the mortgagors. We can not agree with the appellant in the claim that the last sale was made wholly upon the judgment rendered by the justice of the peace. By the express terms of the statute it is this sale which satisfies the lien of the original judgment. The sale is to be regarded as having been made upon the original decree, and we think the title acquired by such sale relates back to date of the execution of the mortgage on which it was rendered. By the payment of the redemption money to the clerk, the appellee became the equitable assignee of the decree upon which the sale had been made. *Carver v. Howard*, 92 Ind. 173; *Lowrey v. Byers*, 80 Ind. 443; *Gerber v. Sharp*, 72 Ind. 553.

As the appellee succeeded to the rights of the mortgagees in the decree and to the rights of Snoddy, save in the matter of being required to again expose the land to sale, it follows that all of the interest of the appellant was divested by the last sale and the sheriff's deed made pursuant thereto, and that the court did not err in sustaining the demurrer of the appellee to the complaint.

Judgment affirmed.

Filed Jan. 24, 1889.

Brake v. Sparks *et al.*

No. 13,499.

BRAKE v. SPARKS ET AL.

MORTGAGE.—*Payments.*—*Application of.*—*Forfeiture.*—Where the owner of real estate, who is indebted to the mortgagee thereof only to the extent of the mortgage debt, pays sums of money to the mortgagee from time to time, a part of which is ostensibly for rent, with no agreement as to where the money so paid shall be applied, except that if the mortgagor shall pay the mortgage debt within a certain time the sums paid as rent shall be applied thereon, such payments will, in the absence of a stipulation for a forfeiture, be applied upon the mortgage debt.

CONTRACT.—*Admission in, as to Amount Due.*—*Avoidance.*—*Reformation.*—Where a contract contains an admission as to the amount due from the defendant to the plaintiff, it is not necessary for the former to ask a reformation thereof, but an answer alleging that the contract was drawn by the plaintiff, and that he erroneously, either purposely or inadvertently, inserted an amount greater than that due from the defendant, is sufficient to avoid the effect of the admission.

From the Vigo Circuit Court.

S. B. Davis and *S. C. Davis*, for appellant.

C. F. McNutt, *J. G. McNutt*, *F. A. McNutt* and *D. N. Taylor*, for appellees.

OLDS, J.—This action was brought by appellant upon seven promissory notes and to foreclose a mortgage given to secure the same. The notes were executed by appellee Richard J. Sparks to Mary G. Messer, and the mortgage was executed by Mary E. and Richard J. Sparks to secure the notes, which were given for the purchase-money of the real estate described in the mortgage, as appears from the mortgage. Appellant became the owner of the notes and mortgage by endorsement from Mary G. Messer. Appellee George W. Crapo purchased the real estate, and assumed the payment of the mortgage debt as a part of the consideration.

Appellees jointly answered, admitting the facts stated in the complaint, but averring that, on the 5th day of July, 1881,

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the appellant entered into a written agreement in the following words and figures, to wit:

“TERRE HAUTE, INDIANA, July 5th, 1881.

“Received of R. J. Sparks forty dollars to be applied on rent of house at the rate of fifteen dollars per month, in advance, from March 1st, 1881; and if said Sparks wishes to pay for said house and lot as per mortgage given to Mrs. Messer, then the above payments and all subsequent payments until March, 1882, to apply on said notes mentioned in said mortgage. Said Sparks further agrees to give possession on March 1st, 1882, or sooner, if he feels unable to pay out as per mortgage above mentioned. JOHN J. BRAKE.”

That on said day and thereafter, in pursuance of said writing, Sparks and Sparks made sundry payments up to March 24th, 1882, amounting in all to one hundred and ninety dollars. That afterwards, on the 25th day of April, 1882, the plaintiff and defendant R. J. Sparks entered into a written agreement in the words and figures following:

“Whereas Richard J. Sparks is indebted to John J. Brake in the sum of thirteen hundred dollars and interest from November 11th, 1879, which amount is covered by notes secured by a mortgage made by said Sparks to Mary G. Messer (and by her assigned to said Brake), and recorded in record —, page —, of Vigo county and State of Indiana; and whereas two of said notes, and interest on all of said notes, are now overdue, it is agreed by said Sparks and Brake that Sparks shall pay fifteen dollars on the 25th day of April, 1882, and a like sum on the 20th day of each succeeding month until April 20th, 1883, at which time or sooner, at the option of Sparks, he is to pay all that may be due on said notes, deducting the fifteen dollars monthly payments; failing to pay the monthly payments, or what may be due by the 20th of April, 1883, Sparks is to convey the premises, described in the mortgage heretofore mentioned to Brake, by warranty deed in fee simple, free from all encumbrances. Sparks further agrees to keep insurance of eight hundred

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dollars in some good and reliable insurance company, to be paid to Brake in case the dwelling on the premises is destroyed or injured by fire.

“Witness our hands this 25th day of April, 1882.

“JOHN J. BRAKE.

“R. J. SPARKS.”

That on said day and thereafter, Sparks and Sparks, in pursuance of said written agreement, made divers payments which were endorsed and credited on the same by Brake, amounting to one hundred and ninety-five dollars; that Brake drafted the agreement, and erroneously, either purposely or inadvertently, recited the amount due as being thirteen hundred dollars, and interest from November 11th, 1879, when in truth and in fact the sum due was thirteen hundred dollars and interest, less the payments made under the contract of July 5th, 1881; that after the execution of the contract of April 25th, 1882, Sparks and Sparks, finding themselves unable to pay the residue of the purchase-money, offered to convey the real estate in accordance with the terms of said written agreement, the same real estate mentioned and described in the mortgage sued upon; that the appellant, Brake, declined to receive the conveyance, and requested defendants to make such disposition of it as they could, as he preferred the money to the land; that afterwards Sparks and Sparks conveyed the same to Crapo as admitted, Crapo assuming and undertaking to pay the mortgage debt. It is further alleged in the answer, that Crapo made other payments and tendered the balance due on the notes, after deducting the amount paid under the contracts set out, to appellant, and brought the amount tendered and due into court and asked judgment in their favor for costs.

To this answer appellant demurred. The court overruled the demurrer, to which ruling the appellant reserved exceptions. Appellant then replied. Trial was had before the court without a jury, finding for appellant in the sum of

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\$903.50, and judgment against R. J. Sparks and G. W. Crapo, and a decree of foreclosure against all of appellees.

Appellees moved the court to tax the costs of the issue of payment to appellant, which motion the court sustained and appellant excepted. Appellant moved the court for a new trial, which was overruled by the court, to which ruling appellant excepted.

The first error assigned is the overruling of the demurrer to the answer. It is contended by counsel for appellant that the answer is insufficient; that the first contract is a conditional one; that if Sparks failed to pay the mortgage debt within the time fixed he can have no credit for any payment of rent on the debt, and that the parties recognized this construction by reason of the fact that the second contract contains the admissions that there was at that time \$1,300, with interest from November 11, 1879, due Brake on the notes and mortgage, and that there is not a proper averment in the answer of such recital and admission being inserted in the contract through fraud or mistake to avoid the admission, and no prayer for reformation of the contract. This action is brought for judgment for the amount of the principal and interest due on the notes and for foreclosure of the mortgage. No allusion is made in the complaint to either of the contracts or to the receipt of any rent.

The answer is pleaded as a bar to the action on the theory that the amount paid under these contracts applied as payment, and liquidated so much of the debt, and alleges that other sums had been paid, reducing the amount due to a sum stated, and that the sum due had been tendered and brought into court. To show the manner and by what arrangements the money was paid, they set out these contracts in the answer; then, to avoid the force of an admission that there was \$1,300, and interest from November 11, 1879, due at the time of making the last contract, they allege that in fact there was not that amount due; that there was only due said amount, less the amount paid on the first contract; that the

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contract was drawn by appellant and the amount was erroneously, either purposely or inadvertently, inserted in the agreement.

There is no stipulation in either of these contracts that the money paid should be forfeited in case Sparks should fail to pay the full amount due on the mortgage debt within the time stated in the contracts. The action was brought upon the notes and for foreclosure of the mortgage. By these contracts it is shown that under the first contract the appellant had received \$190 from appellee Sparks, which was paid as rent on the mortgaged premises, and under the second contract appellant had received from Sparks \$195, which is not even shown to have been paid as rent. It is averred in the answer that Sparks offered to convey the real estate to appellant in satisfaction of the mortgage debt, and appellant refused to accept a conveyance, and brings this suit for his mortgage debt. It is not inconsistent with any of the provisions of the contract to apply the amounts paid on the mortgage debt. There is no provision at all as to where it shall be applied, except if appellee Sparks pay the debt within the time stated. In case he fails to pay the whole debt within the time fixed by the contract, it leaves Sparks in the position of having made payments of money to appellant when he was in no way indebted to appellant except on the mortgage debt, and he now asks that such payments be applied as credits on the debt. There being no stipulation for the forfeiture of the money, the court will not hold that there was a forfeiture. The appellees were clearly entitled to have the amounts paid under these contracts applied in satisfaction of the mortgage debt.

The recital in the second contract being no more than an admission of the amount then due, there was no necessity for a reformation of the contract, and the averment in the answer that it was drafted by the appellant, and erroneously, either purposely or inadvertently, inserted, and that there was in fact not that amount due at the time,

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is a sufficient averment to avoid the effect of the admission. There was no error in overruling the demurrer to the answer.

The evidence fully supports the finding and judgment of the court, under the construction we have given to the contracts. The question of the ruling of the court on the motion to tax costs is not presented by the record. We find no error in the record.

Judgment affirmed, with costs.

Filed Jan. 24, 1889.

No. 13,529.

HARRELL v. HARRELL.

MARRIED WOMAN.—*Liability to Husband for Borrowed Money.*—Where a wife, possessing a large estate of her own, obtains money from her husband to be used in and for the benefit of her separate business, and expressly promises to repay it, the husband has an equitable claim for repayment which he may enforce by suit.

From the Rush Circuit Court.

C. Cambern, T. J. Newkirk and W. A. Cullen, for appellant.

B. L. Smith, W. J. Henley, J. Q. Thomas and J. J. Spann, for appellee.

ELLIOTT, C. J.—The appellee alleges in his complaint that his wife, the appellant, possessed at the time of their marriage an estate of the value of \$27,000, and that his estate was of the value of \$20,000; that she was then conducting on her own account the business of farming and stock raising; that, for use in her separate business, she obtained from

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the appellee \$2,000, which she expressly promised to repay ; that the money was necessary for the use of the appellant in her separate business, and was obtained to prevent actions from being brought against her.

The complaint states a cause of action investing the husband with a right to sue.

Under our statute, a married woman may contract as a *feme sole*, except in such cases as are forbidden. R. S. 1881. Section 5115 declares that "All the legal disabilities of married women to make contracts are hereby abolished, except as herein otherwise provided." Section 5117 provides that she may, in her own name, as if she were unmarried, make any contracts with reference to her personal estate ; and section 5130 declares that she may carry on any business on her sole and separate account. She is forbidden to convey or mortgage her real estate, and she is prohibited from becoming a surety, but these are the only express restraints upon her right to contract. There is no reason why she may not borrow money from her husband to enable her to conduct her separate business, or prevent the sacrifice of her property. If she does voluntarily borrow from him under an express contract, and there is neither fraud nor oppression nor any injustice, no valid reason exists why she should not be compelled to repay him, for he is her creditor.

The relationship between the parties does, however, exert an important influence upon the contracts of the wife. It is, doubtless, incumbent on the husband to show an express contract and its consideration, as well as good faith and voluntary action. We very much doubt whether he could recover without alleging and proving the express contract and its consideration, in any case ; certainly he could not recover money placed in the hands of his wife without showing the purpose for which she obtained it, and an express promise to repay it. There yet remains, notwithstanding the sweeping language of the statute, some limitations upon the rights and liabilities of married women, and the old theory of the com-

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mon law that the *baron* and *feme* constituted, in legal contemplation, one person, is not entirely overthrown. *Barnett v. Harshbarger*, 105 Ind. 410. It is, however, broken upon so much as to permit husband and wife to deal with each other concerning personal property.

Where there is full consideration yielded by the husband, entire good faith, an express contract, and the money is received by the wife for the benefit of her separate estate, and to prevent injury to that estate or loss to the wife, the courts can not do otherwise than uphold the claim of which the contract forms an element.

As held in *Cupp v. Campbell*, 103 Ind. 213, and other cases, a third person contracting with a married woman must show that the debt was contracted by the wife as her debt, and where the person with whom she contracts is her husband, this rule must be extended, for the husband must show not only an express contract, but, also, that in equity and good conscience he is entitled to enforce his claim. The contract is not valid in the sense that it can be enforced strictly as a contract. *Barnett v. Harshbarger, supra*. This is so, because, in strict law, the husband can not recover solely upon a contract made with his wife, since the theory of the unity of person still exists. But while the husband can not enforce the contract, as contracts between other parties than husband and wife may be enforced, still, the express contract may constitute an essential element of an equitable claim that the courts will enforce. We suppose that a husband can not maintain an action for damages against his wife for a breach of contract, but he may recover upon a claim which is shown to be equitable and just. Where he lends her money upon an express contract, fair and equitable in all its parts, he has a claim to be repaid the money, which courts of conscience will respect. Upon him, however, rests the burden of showing a claim that equity and good conscience will enforce as just and reasonable. An express contract is an essential element in such a case as this, for money advanced to the wife

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is presumed to be advanced to her in virtue of her marital rights, and not upon the theory that it is money which she is bound to repay. To overcome this presumption it is necessary for the husband to show an express contract as a constituent element of his equitable claim. It may well be doubted whether, in any case, there can be such a thing as an implied contract between husband and wife, making the wife a debtor of the husband; but there may be an express contract, which, taken in connection with other facts, may give the husband an equitable claim which the courts will enforce. It is, however, the equitable claim, and not the naked contract, which evokes assistance from the courts.

The complaint before us pleads facts constituting an equitable claim, and the trial court did right in overruling the demurrer.

Judgment affirmed.

Filed Jan. 24, 1889.

No. 13,013.

SWEETSER v. THE ODD FELLOWS MUTUAL AID ASSOCIATION OF INDIANA.

INSURANCE.—*Payment of Premiums.—Forfeiture.*—An insurance company will not be permitted to insist upon a forfeiture, if by any agreement, either express or implied by the course of its conduct, it leads the insured honestly to believe that the premiums or assessments will be received after the appointed day.

SAME.—*Waiver of Payments.—Estoppel.*—Mere occasional voluntary indulgence on the part of an insurance company, in the absence of an express or implied agreement to waive payment of assessments according to

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the conditions of the contract, can not justly be construed as a permanent waiver. But such a course of dealing may be pursued as will enable the company to say that there was no agreement.

SAME.—Evidence.—Declarations of Officers.—It is immaterial what the officers of the company may have told the insured concerning his delinquency, and its effect upon his certificates, provided the course of dealing of the association, and the acts and declarations of its agents, were such as to induce him to believe that the time of payment would be extended as theretofore.

PLEADING.—Reply.—New Matter.—Departure.—A departure occurs when the reply is inconsistent with the case made in the complaint, or when, in a second or subsequent pleading, a party abandons the ground he took in his last antecedent pleading, and resorts to another. But it is not a departure to set up new matter by way of replication, or additional facts, not inconsistent with those averred in the complaint.

From the Marion Superior Court.

W. Wallace and L. Wallace, for appellant.

W. Irvin, F. M. Finch and J. A. Finch, for appellee.

MITCHELL, J.—This was an action by Frances M. Sweetser to recover upon two certificates issued by the Odd Fellows Mutual Aid Association of Indiana to James N. Sweetser, by the terms of which the association agreed, upon certain considerations mentioned, to pay to the plaintiff, who was mentioned in the certificates as one of the beneficiaries, a certain sum of money upon due proof of the death of James N. Sweetser.

It was averred in the complaint that Sweetser died on December 16th, 1880, and that proof of his death had been waived by the company. The certificates, copies of which are set out, contain a stipulation to the effect that if the assured should fail to pay any assessment within ten days after receiving notice thereof, the contract should be void and of no effect. It was averred in the complaint that the company and the assured had mutually agreed that the assessments might be paid at any time within sixty days after notice, and that the assessments had been paid for two years prior to the death of the assured according to that agreement.

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The answers denied the alleged agreement, and set up that the assured had been delinquent, in that he failed to pay assessments from time to time according to the terms of the certificates, that he was in default upon two assessments at the date of his death, and that the certificates had, therefore, become void and of no effect.

The plaintiff replied, in substance, that the company had permitted the certificates to stand uncanceled, notwithstanding the failure to pay, and that it had waived the conditions contained in the certificates by receiving payment of assessments from time to time within sixty days after giving notice, without making any objection until after the death of the assured, when, it is averred, notice was given that the policy had been forfeited, and that no more payments would be received.

It is contended that the court erred in overruling a demurrer to the reply, (1) because it is a departure, and (2) because it does not state facts sufficient to avoid the answer.

A departure occurs when the reply is inconsistent with the case made in the complaint, or when, in a second or subsequent pleading, a party abandons the ground he took in his last antecedent pleading, and resorts to another. *Stephen Pleading*, 410. But it is not a departure to set up new matter by way of replication, or additional facts, not inconsistent with those averred in the complaint. *Fanning v. Ins. Co.*, 37 Ohio St. 344.

As showing an excuse for not having made payment of the assessments according to the terms of the certificates, it was averred in the complaint that they had been paid in conformity with a mutual agreement between the assured and the association. This averment was wholly immaterial, except as to assessments remaining unpaid. The answer denied the agreement, and sought to avoid a recovery by alleging the non-compliance with the condition, and that the certificates had thereby become void. The plaintiff replied that

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the condition had been waived by the conduct of the association.

The reply is not an abandonment of the complaint. It does not resort to another cause of action or ground of recovery, nor does it allege facts inconsistent with those averred in the complaint. It is therefore not obnoxious to the first objection urged.

Construed in connection with the antecedent pleadings, it fairly appears from the reply that the habit of the company or association was to receive payment of assessments after the time fixed therefor by the terms of the certificate, provided they were paid within sixty days from the date of notice, and that the policy stood upon its books uncanceled at the date of the death of the assured. This being so, the company will not be heard to assert a forfeiture after the death of the assured, when, by its course of dealing with him, it may have induced him to believe payment might be made within sixty days after the receipt of notice.

It is abundantly settled that an insurance company will be estopped to insist upon a forfeiture, if, by any agreement, either express or implied by the course of its conduct, it leads the insured honestly to believe that the premiums or assessments will be received after the appointed day. The decisions which hold and enforce this view are very numerous. *Insurance Co. v. Eggleston*, 96 U. S. 572; *Insurance Co. v. French*, 30 Ohio St. 240; *Helme v. Philadelphia L. Ins. Co.*, 61 Pa. St. 107; *Stylow v. Odd Fellows Mut. Life Ins. Co.*, 69 Wis. 224; *Appleton v. Phoenix Mut. L. Ins. Co.*, 59 N. H. 541 (47 Am. Rep. 220); *Teutonia Life Ins. Co. v. Anderson*, 77 Ill. 384; *Hanley v. Life Ass'n*, 69 Mo. 380; *Northwestern M. L. Ins. Co. v. Amerman*, 119 Ill. 329; Bacon Benefit Societies, section 431.

Forfeitures are not favored in the law, and courts, in order to avoid the odious results of a forfeiture, are not slow in seizing hold of such circumstances as may have been acted on in good faith, and which indicate an agreement on

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the part of the company, or an election, to waive strict compliance with the conditions and stipulations in the policy. Continuing a policy in force and accepting payment of premiums thereon, with full knowledge of facts which, according to a condition of the contract, make it voidable, is a waiver of the condition. *Havens v. Home Ins. Co.*, 111 Ind. 90.

One party to a contract will not be permitted to make a show of continued leniency, or a pretence of liberality, repeated with such uniformity as to put another off his guard, and afterwards, by a sudden change in his course of conduct, declare a forfeiture, when the other party is helpless to avert the consequences. It is quite true that mere occasional voluntary indulgence on the part of an insurance company, in the absence of an express or implied agreement to waive payment of assessments according to the conditions of the contract, can not justly be construed as a permanent waiver, or as depriving the company of the right to insist upon a forfeiture, or to cancel its policy on account of the failure to pay according to the stipulations therein written. *Thompson v. Insurance Co.*, 104 U. S. 252. But such a course of dealing may be pursued as will estop the company to say that there was no agreement, after it has permitted its policy to stand open and uncanceled, and after it has accepted payment of overdue premiums or assessments in a specified manner, which has been conformed to during the lifetime of the insured, and until the opportunity to make further collections has been cut short by his death. Although the company had the right to declare the contract forfeited for non-payment of assessments within the stipulated time, yet if, after the insured had become delinquent, a new assessment was made with knowledge of the delinquency, this constituted a recognition of the continued validity of the policy or certificate, and a waiver of all pre-existing rights of forfeiture. *Niblack Mut. Ben. Soc.*, section 339. In every aspect of the case the reply was, therefore, sufficient.

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The evidence tended to show that Sweetser became a member of one division of the association in December, 1876, and of the other in January, 1877. He died suddenly on the 15th of December, 1880. The evidence shows that, prior to the year 1880, the insured paid, with reasonable promptness, the payments falling due on the 25th of the current month, "being paid on or before the 29th." In 1880, payments falling due as above were made as follows: The assessments for February and March were paid April 2d; those of April and May on May 28th; that of June on July 26th; that of July on August 31st; that of August on October 18th; and the last, that of September, on November 24th. The September payment was made by the insured in person at the office of the association, and he was then informed by the secretary and general manager of the company that his October assessment was past due, and that his November assessment would fall due the next day. The agent received the money for the September assessment, and the insured left, saying that he would pay the October and November assessments in a few days. This was on the 24th day of November. He died on the 15th of December, without having paid or offered to pay the last two assessments. No formal action had been taken by the association to cancel the certificates, or declare a forfeiture, nor was the insured informed, when the payment last made by him was received, that the lenity previously extended would no longer be continued. Within fifteen days after the death of the insured, the plaintiff, who had become the sole beneficiary, appeared at the office of the association to make proof of the death, and was then informed for the first time of the delinquencies and of the forfeiture claimed. Proof of death was duly made, and the association refused to receive the delinquent assessments. It also appeared that the insured had received written or printed notices of all the assessments, and that upon each notice there was printed a note, to the effect that agents were not authorized to extend the time of payment beyond

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ten days after receipt of notice, and that any delay beyond that time would be at the risk of the member, and would not be construed as a waiver of any right of the association.

Upon this evidence the jury found for the plaintiff below. It is now insisted that the finding is not sustained by the evidence.

The case is not altogether clear and satisfactory upon its facts. We are of opinion, however, that it was peculiarly a question of fact for the jury to determine whether or not, under all the circumstances, the conduct of the association was not such as to throw the insured off his guard, and to raise an implied agreement on its part to continue in the same course of dealing, so long as it received his money without giving notice of a contrary purpose.

It is a significant circumstance that twenty-three days before the death of the insured the association received from his hand, at its home office, the September assessment then nearly sixty days overdue. He was informed at that time that his October assessment was past due, and that his November assessment would mature on the following day. The insured left, saying he would pay the assessments in a short time. There was no intimation from the officers or agents of the company that any forfeiture of the policy was contemplated, or that the money would not be received, if tendered in conformity with the other payments recently made.

The jury must have drawn the inference that the association had permitted the insured to turn away from its office, resting upon the belief that there had arisen from this last interview, and from the previous conduct of the officers of the association, an implied agreement that the association would receive the October and November assessments, notwithstanding the delinquency, in case they were paid, or tendered, as payments had been theretofore made. Nor can we doubt that payment would have been accepted, as in the other cases, but for the intervention of the death of the insured. It is not necessary that there should have been an

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agreement formally expressed in words to extend the time. If the officers of the association manifested by their acts, declarations or conduct their assent to an extension of time, and their intention not to insist upon a forfeiture, and the insured honestly and in good faith relied and acted upon their conduct or declarations, the association is now estopped to say there was no agreement. We can not disturb the judgment on the evidence.

The instructions complained of put the case to the jury fairly upon the legal principles already enunciated in this opinion. It would serve no useful purpose to set them out.

At the trial the appellant offered to prove by its secretary and principal manager that he told the insured on one occasion that some of his assessments were overdue; that he had thereby lost his rights to his certificates, and that he was delaying payment at his own risk and peril. This testimony was excluded. We are unable to perceive the materiality of this evidence. The court admitted in evidence notices of assessments received by the insured, upon every one of which was printed substantially the same information, only in more emphatic terms. Insurance companies can not, however, either by printed notices, or by verbal communications, continue their right to insist upon forfeiting a contract for non-payment of assessments, and at the same time habitually accept overdue assessments whenever tendered. After a forfeiture has occurred, a new assessment against the member, and an acceptance of the overdue assessments, inevitably waive the previous forfeiture, notwithstanding the notice that non-payment will be at the risk of the member.

It was, therefore, wholly immaterial what the secretary may have told the insured concerning his delinquency, and its effect upon his certificates, provided the course of dealing of the association and the acts and declarations of its agents were such as to induce him to believe that the time for payment would be extended as theretofore. The conversation proposed did not in any way tend to show the absence of an

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understanding or agreement to continue the previous course of dealing, or that the association would thereafter insist upon the enforcement of the terms of its contract, in case of failure to comply by paying assessments when due.

We find no error in the record.

The judgment is therefore affirmed, with costs.

Filed Jan. 24, 1889.

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No. 13,389.

PROSSER v. CALLIS ET AL.

LIBEL.—*What Constitutes.*—*Distinguished from Slander.*—It is not necessary that the words used in a published article should be slanderous, to maintain an action for libel. Any publication that tends to degrade, disgrace, or injure the character of a person, or bring him into contempt, hatred, or ridicule, is as much a libel as though it contained charges of infamy or crime. It is a libel to charge that a county officer published a false verified statement of the financial condition of the county.

SAME.—*Slanderous Words.*—*Evidence.*—*Person Referred to.*—*Opinion of Hearers.*—Where slanderous words are written or spoken of one, by indirection, and are read or heard by persons conversant with the facts, it is competent to prove by such persons, who, in their opinion, was referred to by the language used.

From the Morgan Circuit Court.

L. Ferguson, C. G. Renner and G. A. Adams, for appellant.

J. V. Mitchell, W. R. Harrison and W. E. McCord, for appellees.

COFFEY, J.—This was an action brought in the Morgan Circuit Court by the appellant against the appellees and one McCord. The amended complaint in the cause is substan-

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tially as follows: That the plaintiff prior to and on the 22d day of August, 1885, was the auditor of Morgan county, Indiana; that as such auditor he made, signed and published a certain report of the finances of said county, which report for the year ending May 31st, 1885, he made, signed and published prior to said 22d day of August, 1885; that the defendant Lizzie O. Callis is, and, on the said 22d day of August, was, the owner and publisher of the "Weekly Gazette," a newspaper of general circulation in said county of Morgan, printed and published at the city of Martinsville, in said county and State; that the defendant Edwin W. Callis is, and, on said 22d day of August, 1885, was, the editor and business manager of said newspaper; that on said 22d day of August, 1885, the defendant Elam M. McCord did write, and the defendants did print, utter and publish in the columns of said Weekly Gazette, of and concerning the plaintiff, and referring to the report so made by the plaintiff, the following false, libellous and slanderous words and figures, to wit:

"At last, after many days of weary waiting and particular prodding, the county *dads* come out with a statement pretending to show the financial condition of Morgan county. Such a statement! It can not be understood by even a Philadelphia lawyer. One quite big item of expenditure, the cost of building the bridge at Mooresville, amounting to about \$15,000, is entirely left out of the calculation. We suspect there may be other omissions of the same character, but have not time to search them out for this issue. Now, if such an important item as this is omitted while the statement is sworn to as correct, there is every reason to believe that the whole statement is a piece of financial botch-work, patched up to ease popular clamor. If an officer [plaintiff meaning] will swear to one lie, he will swear to another," thereby charging, and intending to charge, that the plaintiff was guilty of the crime of perjury and of falsehood, and of making a false report in the leaving out of said report said item of \$15,000,

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cost of said Mooresville bridge, when, in truth and in fact, the cost of said bridge at Mooresville was in said report as made, signed and published by this plaintiff; that the publication of said false, libellous and slanderous article is to plaintiff's damage \$5,000. Wherefore, etc.

The defendants filed a demurrer to this complaint, alleging as cause that the same did not state facts sufficient to constitute a cause of action against them.

The cause was voluntarily dismissed by the plaintiff as to the defendant McCord.

The court then sustained the demurrer of the other defendants to the complaint. The plaintiff elected to stand by his complaint, and the defendants had judgment for costs.

The appellant assigns for error the sustaining of the demurrer of the appellees to his complaint.

It is not necessary that the words used in a published article should be slanderous to sustain an action for libel. Odgers on Libel and Slander, p. 20, says: "In cases of libel, any words will be presumed defamatory which expose the plaintiff to hatred, contempt, ridicule, or obloquy, which tend to injure him in his profession or trade, or cause him to be shunned or avoided by his neighbors. 'Everything, printed or written, which reflects on the character of another, and is published without lawful justification or excuse, is a libel, whatever the intention may have been.' The words need not necessarily impute disgraceful conduct to the plaintiff; it is sufficient if they render him contemptible or ridiculous. Any written words are defamatory which impute to the plaintiff that he has been guilty of any crime, fraud, dishonesty, immorality, vice, or dishonorable conduct, or has been accused or suspected of any such misconduct; or which suggest that the plaintiff is suffering from any infectious disorder; or which have a tendency to injure him in his office, profession, calling, or trade. And so too are all words which hold the plaintiff up to contempt, hatred, scorn, or ridicule, and which, by thus engendering an evil opinion of him in the minds of right-

thinking men, tend to deprive him of friendly intercourse and society."

Appended to this statement of the law by Mr. Odgers is a note, in which is found a list of cases where the use of certain language has been held to be libellous, among which are the following: "He is an infernal villain." *Bell v. Stone*, 1 B. & P. 331. "He is an impostor." *Cooke v. Hughes*, R. & M. 112. "He is a hypocrite." *Thorley v. Lord Kerry*, 4 Taunt. 355. "He is a frozen snake." *Hoare v. Silverlock*, 12 Q. B. 624. "He is a rogue and a rascal." *Villers v. Monsley*, 2 Wils. 403. "He is a dishonest man." *Austin v. Culpepper*, Skin. 123. "A mere man of straw." *Eaton v. Johns*, 1 Dowl. (N. S.) 602. "He is an itchy old toad." *Villers v. Monsley*, 2 Wils. 403. "He is a desperate adventurer, association with whom would inevitably cover gentlemen with ridicule and disrepute." *Wakley v. Healey*, 7 C. B. 591; 18 L. J. C. P. 241. "He grossly insulted two ladies." *Clement v. Chivis*, 9 B. & C. 172. "He is unfit to be trusted with money." *Cheese v. Scales*, 10 M. & W. 488.

Many more illustrations are given, but it is not necessary to pursue them further.

In Starkie on Slander and Libel, section 156, the learned author says: "According to another learned authority, everything written of another which holds him up to that scorn and ridicule which might reasonably (*i. e.*, according to our natural passions), be considered as provoking him to a breach of the peace is a libel. No man has a right, in any form of publication, to render the person or abilities of another ridiculous. * * * So also any publication made without justification or lawful excuse, which is calculated to injure the reputation of another, by exposing him to hatred, contempt, or ridicule, whatever the intention may have been. And so also as to any words in writing from which it may be inferred misconduct is imputed, or which tend to bring a person into contempt, or to set other persons against him as one who has misconducted himself."

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In the case of *Johnson v. Stebbins*, 5 Ind. 364, this court says: "It is not necessary that the words should be slanderous, to sustain an action for libel. Any publication that tends to degrade, disgrace, or injure the character of a person, or bring him into contempt, hatred, or ridicule, is as much a libel as though it contained charges of infamy or crime." To the same effect are *Gabe v. McGinnis*, 68 Ind. 538; *De Armond v. Armstrong*, 37 Ind. 35; *Baine v. Myrick*, 88 Ind. 137; *Hake v. Brames*, 95 Ind. 161; *Crocker v. Hadley*, 102 Ind. 416.

It will thus be seen by an examination of these authorities, that there is a broad distinction between the ordinary action for slander and an action for libel.

In the case of *Hake v. Brames*, *supra*, it was held that it was libellous to write of the plaintiff that he was a liar. Also, that it was libellous to write in a letter that he, the writer, would not believe the plaintiff under oath.

What is the charge under consideration? Viewed in the light of the allegations in the complaint, the publication made by the defendants charges that the plaintiff had made and published a statement of the financial condition of Morgan county; that the statement was false in that it omitted an item of \$15,000; that it was suspected that it was false in other particulars; that there was every reason to believe that it was a piece of financial botchwork patched up to ease popular clamor; that it was sworn to, and that an officer who would swear to one lie would swear to another.

It is hard to imagine what would tend more strongly to bring the appellant into disrepute with right-thinking men than to cause it to be believed that he had no regard for the truth, and that he had descended so low in the moral scale as to have no regard for his oath, and was ready at any time to swear a lie.

In our opinion the publication set out in the complaint, if false, is libellous, and that its publication gives the appellant a cause of action.

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It is argued by the learned counsel for the appellees, that it appears on the face of the publication in controversy that the same does not refer to the appellant, but that it refers to the board of commissioners under the designation of "the county dads."

We are unable to say from the face of the paper who was intended to be included in the term "county dads." The appellant alleges in his complaint that the publication refers to him. Whether it refers to him or to some other person is a question of fact to be determined by the jury under the evidence, and is not a question of law to be determined by the court.

Did the publication refer to the board of commissioners in direct terms, then, under the well known rule that the courts must construe written instruments, the appellant could not be permitted to allege and prove that it referred to him. But this it does not do.

Where slanderous words are written or spoken of one, by indirection, and are read or heard by persons conversant with the facts, it is competent to prove by such persons, who, in their opinion, was referred to by the language used. 2 Greenl. Ev., section 417; *Smauley v. Stark*, 9 Ind. 386; *Proctor v. Owens*, 18 Ind. 21; *Keesling v. McCall*, 36 Ind. 321; *De Armond v. Armstrong*, *supra*; *Montgomery v. Knox*, 3 So. Rep. 211.

The complaint is substantially in the form prescribed by the statute.

In our opinion the court below erred in sustaining the demurrer of the appellees to the appellant's complaint, for which error the judgment should be reversed.

The judgment of the court below is reversed, at the costs of the appellees, with instruction to overrule the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

Filed Jan. 25, 1889.

The State, *ex rel.* Beard, Prosecuting Attorney, *v.* Clendenning.

No. 14,201.

THE STATE, EX REL. BEARD, PROSECUTING ATTORNEY, *v.*
CLEDENNING.

COUNTY COMMISSIONER.—*Term of Office.*—*Act of 1885.*—C. was elected county commissioner in 1884. The regular term in the district for which he was elected expired in December of that year, but by reason of confusion which had resulted from the resignation of a prior commissioner, C.'s predecessor held until December, 1885, when C. entered upon his official duties. H. was elected to the same office in 1886, and claims that he was entitled to possession in December, 1887.

Held, that C.'s right to hold did not terminate in December, 1887, but that, under the act of March 7th, 1885 (Acts of 1885, p. 69), he is entitled to hold until December, 1890, the end of the current term.

From the Clinton Circuit Court.

S. H. Doyal and *P. W. Gard*, for appellant.

T. H. Palmer and *W. F. Palmer*, for appellee.

MITCHELL, J.—Information in the nature of a *quo warranto* by the State, on the relation of the prosecuting attorney of the 45th judicial circuit, calling in question the right of Arthur J. Clendenning to continue in the office of county commissioner for the second district in Clinton county, and alleging that Hugh R. Hamilton had been duly elected and qualified, and was then entitled to hold and discharge the duties of that office.

The respondent answered to the effect that the board of commissioners of Clinton county was first organized in May, 1830, and that it was determined, according to the method prescribed by the law then in force, that the first term of the commissioner for the second district should expire in the year 1833. It is averred that from 1833 until 1867 the several successive commissioners in the second district held their terms regularly, but that from 1867 until the date of the commencement of the suit, by reason of the resignation

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of a commissioner, the terms had been held irregularly, each commissioner holding over one year into the term of his successor. The answer shows that the respondent was elected at the general election in November, 1884, but that, by reason of the confusion theretofore existing in the manner of holding in the second district, his predecessor continued in office three years, and until the first Monday in December, 1885, at which time the respondent took possession of the office, his predecessor having thus encroached one year on his term. Hamilton was elected at the general election in November, 1886, and claimed the right to enter upon the duties of the office on the first Monday of December, 1887. The question is whether or not the respondent's right to hold terminated on the first Monday of December, 1887, that being the end of a regular term, or whether, under the act of 1885, he is entitled to hold until the first Monday in December, 1890, the end of the current term.

As will be seen, the first commissioner's term in the second district expired in the autumn of 1833. Taking the expiration of the first term as the initial point, and calculating consecutive periods of three years, it necessarily follows that a regular term for the district in question expired in the autumn of 1884, another on the last day of November, 1887, and that the current term will expire on the last day of November, 1890. The respondent was elected in November, 1884, and was lawfully entitled to commence service as soon as he was elected and qualified. Under the practice that prevailed in that district, however, since 1867, his predecessor encroached upon his term and was occupying the office when the act of March 7th, 1885, took effect. When that act took effect the respondent was a commissioner-elect, whose predecessor was then holding the office by encroachment on his term. It was declared in the act of 1885 that "each commissioner-elect who shall hereafter, but prior to the end of the regular term, as provided in this act, for the district for which he was elected, begin his service as com-

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missioner, shall serve three years and to the end of the regular term of said district, and until his successor is elected and qualified." Acts of 1885, p. 69.

By the very terms of the above act, the respondent was entitled, as a commissioner-elect, to begin his service as commissioner, the term of his predecessor having expired, and to serve three years, and to the end of the regular term in the second district. Having the right to serve three years from the time of commencing service, which carried him to December, 1888, a point which left a fraction of a term, he is now, within the very words of the statute, entitled to serve to the end of the current regular term. *Jones v. State, ex rel.*, 112 Ind. 193; *Parcel v. State, ex rel.*, 110 Ind. 122; *State, ex rel., v. Barlow*, 103 Ind. 563.

The distinction between the present case and *Parcel v. State, ex rel., supra*, is, that in the case cited there had been no irregularity or confusion until the relator, who was his own successor, he having been elected in the first instance to fill out an unexpired term, sought to extend his term of service by failing to qualify as his own successor until one year of his second term had elapsed, thus creating confusion where none had existed before. We held in that case that the relator could not himself extend his first term one year beyond its specified time, and wrongfully encroach on his second or regular term, and thus by his own act create a state of things which would bring him within the letter of the act of 1885, and entitle him to hold three years and until the end of the next regular term.

As the ruling of the circuit court was in consonance with the views above enunciated, its judgment is affirmed, with costs.

Filed Jan. 25, 1889.

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Nace v. The State.

No. 14,392.

NACE v. THE STATE.

CRIMINAL LAW.—*Keeping Disorderly Liquor Shop.—Statute Construed.*—Under section 2097, R. S. 1881, which provides that "Whoever keeps a place where intoxicating liquors are sold, bartered, given away, or suffered to be drunk in a disorderly manner," etc., shall be guilty of a misdemeanor, the offence consists in keeping the place in a disorderly manner.

SAME.—*Continuous Offence.*—The provision of such section that whoever keeps a place where intoxicating liquors are sold, in a disorderly manner, "shall be fined, for every day the same is so kept, not more than one hundred dollars nor less than ten dollars," creates one continuous offence, the length of time the place is kept, prior to the prosecution, in the manner prohibited, being important only in measuring the punishment.

SAME.—*Justice of Peace.—Jurisdiction.*—Where an affidavit based on such section is filed before a justice of the peace, charging that the defendant has kept a disorderly place for one year, the minimum punishment for the offence charged, being ten dollars for each day, exceeds the justice's jurisdiction, and a judgment of conviction rendered by him is void. The justice having no jurisdiction, the circuit court could acquire none by appeal, and should have discharged the defendant.

From the Howard Circuit Court.

J. C. Blacklidge, W. E. Blacklidge, B. C. Moon and A. C. Bennett, for appellant.

L. T. Michener, Attorney General, *J. H. Gillett and A. B. Kirkpatrick,* for the State.

BERKSHIRE, J.—This was a criminal prosecution originating before a justice of the peace. The charge in the affidavit is the keeping of a disorderly house.

The prosecution rests upon the following section of the R. S. of 1881:

"Section 2097. Whoever keeps a place where intoxicating liquors are sold, bartered, given away, or suffered to be drunk in a disorderly manner, to the annoyance or injury of

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any part of the citizens of this State, shall be fined, for every day the same is so kept, not more than one hundred dollars nor less than ten dollars."

The appellant was tried and convicted before the justice; from the judgment of the justice he appealed to the circuit court, and was again tried and convicted.

In the justice's court he was adjudged to pay a fine of twenty-two dollars and fifty cents, and in the circuit court a fine of one hundred dollars.

There was a motion in the circuit court, made by the appellant, to quash the affidavit, which was overruled, and the proper exception reserved.

This motion brings in question for construction the section of the statute above set out.

The charge in the affidavit is, "that on or about the 27th day of July, 1886, and for a period of one year prior thereto continuously, at the county of Howard and State of Indiana, William F. Nace, late of said county and State aforesaid, did then and there unlawfully keep a place where intoxicating liquors were sold, bartered, given away, and suffered to be drunk in a disorderly manner, by then and there unlawfully harboring, entertaining and permitting within said place Emma Bradford, Nellie Hamilton, Cora Gray, and divers other persons, both male and female, to this affiant unknown, all of whom were then and there persons of bad repute for virtue, chastity, morality and peaceableness, and while then and there in said place unlawfully allowing and permitting the said persons of bad character for virtue, chastity, morality and peaceableness to quarrel, curse, swear, fight and riot, and use other improper and obscene language, and by then and there unlawfully suffering, allowing and permitting said persons of bad character for virtue, chastity, morality and peaceableness to indecently expose their persons, and by then and there unlawfully suffering, permitting and allowing divers other persons, both male and female, to this affiant unknown, to have unlawful, promiscuous and indiscriminate

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sexual commerce, all to the annoyance and injury of William Beckett, and divers other persons to this affiant unknown, all of whom were citizens of the county of Howard and State of Indiana, residing within sight and hearing of said place so unlawfully kept by said William F. Nace."

The contention of counsel for the appellant is, that the keeping of a place "in a disorderly manner," where intoxicating liquors are sold, bartered, given away, or suffered to be drunk, is not an offence within this statute. That the words "in a disorderly manner," refer not to the place kept, but to the acts of selling, bartering, giving away, or suffering to be drunk, at or in the place kept, and as the affidavit fails to allege any such disorderly acts, it is bad for that reason, and should have been quashed.

We are not of this opinion.

Suppose the section is transposed so as to read thus:

"Whoever keeps a place in a disorderly manner where intoxicating liquors are sold, bartered, given away, or suffered to be drunk, to the annoyance or injury of any part of the citizens of this State," etc.

When thus transposed there is no difficulty as to the construction to be placed on this statute. It at once becomes manifest that the words "in a disorderly manner" refer to the place that is kept, and not to acts of sale, barter, giving away or drinking of intoxicants.

It will be difficult to transpose the language employed so that the section will bear a different construction from the one we have stated.

Again, if a comma is placed between the words "drunk" and "in," the section will read thus:

"Whoever keeps a place where intoxicating liquors are sold, bartered, given away, or suffered to be drunk, in a disorderly manner." The use of the comma removes all doubt as to what the construction should be.

But we can imagine no reason for which the Legislature would prohibit one who keeps a place where intoxicating

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liquors are sold and drunk from carrying on his business in that regard in a disorderly manner, and leave him perfectly free to encourage and maintain every other species of disorderly conduct at his said place.

The intention of the Legislature in the enactment of this statute is very manifest.

The appellant moved in the circuit court in arrest of judgment, and for a discharge from the prosecution.

There is but one central question raised by these motions, and our reasoning and the authorities cited will apply alike to both.

The question presented by these motions is more serious than the one we have considered.

They bring in question the jurisdiction of the court over the offence charged in the affidavit. Justices of the peace have jurisdiction in criminal cases such as is given to them by statute, and no other.

The following are all of the sections of the statute that relate to the jurisdiction of justices in criminal cases. R. S. 1881 :

"1634. When the offence charged is a felony, and the justice, upon the hearing, is of the opinion that the accused should be held to answer such charge, he shall be recognized to appear at the next term of the criminal court of such county, or, if there be no criminal court, then to the circuit court of such county.

"1635. If the offence charged be a misdemeanor, and one that the justice of the peace has jurisdiction to punish, the prisoner or the State may demand a jury, which may be empanelled and sworn as in other criminal cases; or he may be tried by the justice.

"1636. Such justice or jury, if they find the prisoner guilty of a misdemeanor, shall assess his punishment; or if, in their opinion, the punishment they are authorized to assess is not adequate to the offence, they may so find, and, in

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such case, the justice shall hold such prisoner to bail for his appearance before the proper court, or commit him to jail in default of such bail.

"1637. The jurisdiction of justices of the peace in criminal cases shall be co-extensive with their respective counties, and they shall have exclusive original jurisdiction in all cases where the fine assessed can not exceed three dollars, and concurrent jurisdiction with the criminal court and circuit court to try and determine all cases of misdemeanor punishable by fine only; and in trials before justices, fines to the extent of twenty-five dollars, with costs, may be assessed; and they shall have jurisdiction to make examination in all cases, but they shall have no power to adjudge imprisonment as a part of their sentence, except in the manner specially provided in this act."

Construing these sections together, we state our conclusions as to the jurisdiction of a justice of the peace in criminal cases as follows:

1. He has jurisdiction to hold a preliminary examination when a person is brought before him charged with a felony, and if, in his opinion, the accused should be held to answer such charge, to recognize him to the criminal or circuit court.

2. If the offence charged is a misdemeanor, and one *that the justice has jurisdiction to punish*, as provided in section 1635, a jury may be demanded, or, by the consent of the State and the defendant, the justice may try it.

3. And if it is determined upon the trial by the jury, or the justice, as the case may be, that the punishment which may be assessed is not adequate to the offence, the justice may recognize the accused to the proper court.

4. The jurisdiction of justices is co-extensive with their respective counties; and in all cases where the punishment can not exceed a fine of three dollars, their jurisdiction is exclusive, and concurrent with the criminal and circuit court, when imprisonment is not a necessary part of the punish-

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ment, and where a fine may be assessed as low as twenty-five dollars.

5. In all cases where the fine can not be less than twenty-five dollars, or where imprisonment must be a part of the sentence, justices have no jurisdiction. *State v. Creek*, 78 Ind. 139.

The statute, as we construe it, which supports this prosecution, creates one continuous offence, and, no difference how long continued, there can be only one prosecution because of what has occurred antecedent to the prosecution.

"Whoever keeps a place * * * shall be fined, for every day the same is so kept, not more than one hundred dollars nor less than ten dollars."

The keeping of a place in the manner prohibited constitutes the offence, and the length of time it has been kept is only important for the purpose of measuring the punishment.

If the law has been violated for five days, the minimum punishment is \$50; if for three hundred and sixty-five days, the minimum punishment is \$3,650. Whart. Crim. Pl. and Prac., sections 125 and 472; *Commonwealth v. Robinson*, 126 Mass. 259; *State v. Lindley*, 14 Ind. 430; Moore Crim. Law, p. 824, note 3; *Overman v. State*, 88 Ind. 6.

The charge in the affidavit is that there was a violation of the statute from the 27th day of July, 1885, to the same day in the year 1886—three hundred and sixty-five days.

The minimum fine upon conviction would largely exceed the justice's jurisdiction; therefore any judgment or sentence which he rendered in the case was a mere nullity. *Horton v. Sawyer*, 59 Ind. 587; *Smelzer v. Lockhart*, 97 Ind. 315; *Wakefield v. State*, 5 Ind. 195; *Commonwealth v. Mitchell*, 115 Mass. 141; 1 Bishop Crim. Proceed., section 394.

As he had no jurisdiction, the circuit court acquired no jurisdiction. The jurisdiction of the circuit court depended entirely upon the justice's jurisdiction. *Horton v. Sawyer*, *supra*; *Mays v. Dooley*, 59 Ind. 287; *Sturgeon v. Gray*, 96 Ind. 166.

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The appellant should have been discharged by the circuit court.

The judgment is reversed, with direction to the circuit court to discharge the appellant.

Filed Jan. 25, 1889.

117 120
131 441

No. 14,257.

GEIGER ET AL. v. BRADLEY, TRUSTEE, ET AL.

DRAINAGE.—Statute.—Repealing Section of Act of April 6th, 1885.—Saving Clause.—Under the repealing section of the drainage act of April 6th, 1885, which repealed the act of March 8th, 1883, all assessments for work done under the latter act were unaffected by the repeal, and were enforceable according to the provisions of the law under which they were made.

SAME.—Repairs.—Assessments.—Delay in Making.—Effect of.—Where eighteen months had elapsed from the completion of the repairs till the assessment was made, and it not appearing that the work was not necessary, or that the trustee had acted in bad faith, the assessment was not thereby invalidated, the rights of none of the parties having been changed, and the rights of innocent parties not having been affected by the delay.

From the Jay Circuit Court.

L. I. Baker, M. S. Williamson and W. J. Houck, for appellants.

J. W. Headington, J. J. M. La Follette and J. M. Smith, for appellees.

OLDS, J.—This is an action brought by Jacob Geiger *et al.* against John Bradley, trustee of Greene township, Jay county, Indiana, and David F. Hoover, treasurer of said county, to enjoin the collection of assessments made against

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the lands of appellants by the trustee of Greene township, and placed on the tax duplicate for collection, under the provisions of section 7 of the act of 1883. Acts of 1883, page 180.

The complaint alleges that the board of commissioners of Jay county, in 1881, established a ditch in said county, with three branches, extending through Greene and Knox townships in said county, and emptying into Salamoniam river; that the ditch was completed according to plans and specifications; that the lands of appellants, together with others not parties to this action, benefited by the construction of said ditch, were assessed for the payment of the costs and expenses of the construction of said ditch and tributaries; that in 1883 one John L. Walker, who was then trustee of Greene township, employed one — to clean out and put in proper repair said ditch and tributaries, and paid for the cleaning out and repairing of the ditch, out of the funds of the township, \$1,350; that to raise the money to reimburse the township funds, Walker, as trustee, apportioned and assessed the estimated costs thereof upon the lands in said township which, in his opinion, would be benefited by such repairs, according to his opinion of the benefits received by each tract, and on the 1st day of April, 1886, without any authority of law whatever, made out a pretended statement of such assessment, and on said day delivered the same to the auditor of said county. Then follows a copy of the assessment in proper form. It is then averred that under and in pursuance of said assessment, and on no other authority, said auditor made out a special tax duplicate embracing all the lands included in such pretended assessment, describing the manner they were placed upon the duplicate, and that said auditor on the — day of April, 1886, delivered said duplicate to John T. Hanlin, as treasurer of said county, who delivered the same to appellee Hoover, as his successor; that appellee Bradley was elected trustee as successor to Walker; and that such assessments are an apparent lien and cloud

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upon the title to the lands of the appellants, and that said treasurer is about to proceed with said duplicate to collect said taxes or assessments off of the property of said plaintiffs severally, and will collect the same unless restrained. Prayer to have such assessments declared void, and for a perpetual injunction against the treasurer and his successors from collecting the same.

Appellees demurred to the complaint, the demurrer was overruled, and they answered. The error assigned and argued is the overruling of the demurrer to the amended second paragraph of appellees' answer. The amended second paragraph of answer is as follows:

"Said defendants John Bradley, trustee of Greene township, and David F. Hoover, treasurer of Jay county, for their amended second paragraph of answer to the plaintiffs' complaint, say that they admit that the said John L. Walker, named in the complaint as former trustee of Greene township, in Jay county, Indiana, made the repairs, expended the sum of thirteen hundred and fifty dollars of the funds of said Greene township in cleaning out and repairing said ditch, and that he made the assessments on the lands of the plaintiffs in Greene township, and in connection with George Horn, trustee of Knox township, made the assessments on the lands of the plaintiffs and others in Knox township, and that said assessments were certified by the auditor of Jay county, who placed the same on the tax duplicate and placed the duplicate in the hands of the defendant David F. Hoover, treasurer of Jay county, who is seeking to collect the same; but defendants aver that, on the 27th day of August, 1881, a public ditch or drain was duly established by order of the board of commissioners of Jay county, with three branches or tributaries, extending in or through Knox and Greene townships in said county, and emptying into the Salamoniam river; that said ditch and its tributaries were made and completed in all respects according to the plans and specifications by said board of commissioners adopted; that the lands of

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the plaintiffs herein, together with other lands, were assessed for the construction of said ditch according to the provisions of the statutes in such cases made and provided; that after said ditch was duly completed as aforesaid, to wit, on the — day of October, 1883, said ditch and its tributaries being out of repair and obstructed so as to not answer its purpose, it was reported to be out of repair and obstructed to John L. Walker, then the trustee of Greene township, in said county, who then and there proceeded to employ and did employ — — — — to clean out and properly repair said ditch and its several branches, which repairs were made and completed on the — day of November, 1884, and paid the reasonable costs of such repairs, to wit, the sum of thirteen hundred and fifty dollars, out of the general township funds of said Greene township; that while said proceedings were still pending before said John L. Walker, trustee as aforesaid, and for the purpose of raising money to reimburse said general township fund of said Greene township for moneys so paid out to clean out and repair said ditch, the said John L. Walker, trustee as aforesaid, on the — day of March, 1886, proceeded to apportion the cost of making such repairs upon the lands benefited by such repairs according to such benefits and to the best of his judgment, and he did so apportion and make the assessments set out and mentioned in plaintiffs' complaint, on the lands in said Greene township; and the said John L. Walker, trustee as aforesaid, being of opinion that a part of said expense and costs of repairs should be charged to the lands located in Knox township, in said county, on the — day of March, 1886, the said John L. Walker, trustee of Greene township, and said George Horn, trustee of Knox township, jointly made the assessments on the lands situate in Knox township, as set out and mentioned in the plaintiffs' complaint; that the said John L. Walker, trustee as aforesaid, made a record of such assessments in a record kept in his office, and within five days after making such assessment, posted up written notices thereof in three of the

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most public places in each of said townships, and near to the line of said ditch, when said work was done, and noted on the record in his office at the time of posting such notices; that no appeal from said assessments, or any of them, having been taken, the said John L. Walker, trustee as aforesaid, caused the same to be duly certified to the auditor of Jay county, who placed the same on the tax duplicate as required by law, and placed said duplicate in the hands of the defendant David F. Hoover, as treasurer of Jay county, for collection; that no appeal has ever been taken from said assessments, or any of them, and that said assessments are still due and owing from said plaintiffs, and said township has never been reimbursed for said sum expended as aforesaid in the repair of said ditch.

It is urged by counsel for the appellant that this paragraph of answer is bad, by reason of the fact that the act of 1885, approved April 6th, 1885 (Acts of 1885, p. 129), repealed the act of 1883, and that the assessment was made after the passage of the act of 1885, and that there was no saving clause which authorized the trustee to make the assessment under the act of 1883. This same question was considered by this court in the case of *Dunkle v. Herron*, 115 Ind. 470, and in that case this court says: "The drainage law of March 8th, 1883, was repealed by section 13 of the drainage act of April 6th, 1885, after the work mentioned in the complaint was completed, and before the township trustee had filed with the county auditor a statement of his assessments of benefits on plaintiffs' lands. This repealing section contained certain provisos, but it is claimed that none of these provisos are broad enough to authorize the township trustee to make such statement of his assessments of benefits to the county auditor. The language of the provisos is somewhat obscure, but, fairly construed, it may be inferred therefrom, we think, that the Legislature intended that all assessments for work done under the laws thereby repealed, should be made

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and collected according to the provisions of such laws, and should not be affected by such repeal."

The ruling of the court below on the demurrer is in harmony with the decision in the case of *Dunkle v. Herron, supra*.

It is further urged in this case that it was the duty of the trustee to make the estimates and assessments immediately on the completion of the work in making the repairs, in time to be placed upon the tax duplicate appearing next after the completion of the work, and that in this case nearly eighteen months elapsed from the completion of the repairs before making the assessments; that the law did not contemplate so long a delay, and by such delay the rights of purchasers might be affected, and that the law should not be so construed as to allow a lien to be created so long after the making of the repairs.

The statute does not provide within what time after making the repairs the trustee shall make the assessments, but that within five days from making the assessments he shall put up notices. It was no doubt the duty of the trustee to make the assessment within a reasonable time after the completion of the repairs; but in this case it is not shown by the complaint or answer that the rights of any of the parties have been changed, or that the rights of innocent parties have been affected by the delay. It does not even appear that the work was not necessary, and no bad faith is charged against the trustee. The township trustee having paid for the work out of the township funds, we do not think he was estopped by reason of the delay from making the assessment.

There was no error in the ruling of the court in overruling the demurrer to the amended second paragraph of answer.

Judgment affirmed, with costs.

Filed Jan. 25, 1889.

The City of Anderson *et al.* v. East.

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122	122
117	126
134	344

No. 13,458.

THE CITY OF ANDERSON ET AL. v. EAST.

MUNICIPAL CORPORATION.—Negligence.—Liability.—A recovery can be had against a municipal corporation only where it negligently performs or fails to perform a ministerial duty imposed by law.

SAME.—Dangerous Walls.—Injury to Citizen's Property.—A municipal corporation is not liable to a citizen, whose building stands on a public alley, for damages sustained by him by reason of the walls of a building, standing on the opposite side of the alley, belonging to another citizen, and negligently permitted by him to become dangerous, falling upon his building and destroying it.

NEGLIGENCE.—Dangerous Walls.—Liability of Owner.—Where two citizens own buildings on opposite sides of a public alley in a city, and the owner of one, after it has been burned, negligently permits the ruined walls to become dangerous, he is liable to the adjacent owner for injury to his property caused by the walls falling upon it, although the city marshal volunteered to take charge of the ruins and have the walls torn down, if necessary.

From the Madison Circuit Court.

E. B. Goodykoontz, F. P. Foster, C. L. Henry, H. C. Ryan
and *E. P. Schlater*, for appellants.

W. R. Pierce and *C. B. Gerard*, for appellee.

ELLIOTT, C. J.—The defendants severed in their defences in the trial court and here separately assign errors. Consequently there are two branches of the case, involving essentially different questions: one in which the rights of the city of Anderson are involved, and another which involves the rights of the appellant Doxey. It is proper, as well as convenient, to first consider and dispose of that branch of the case in which the rights of the municipal corporation are involved.

The judgment against the city of Anderson rests entirely upon the second paragraph of the complaint, and, if that is bad, the judgment is entirely destitute of foundation. Our

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first step, therefore, is to ascertain and determine whether the second paragraph of the appellee's complaint states a cause of action against the city of Anderson.

That paragraph of the complaint contains these material facts :

On the 13th day of November, 1884, the plaintiff was the owner of a building in the city of Anderson. Sixteen feet distant from the plaintiff's building was a large brick structure with walls thirty feet in height. The building was owned by the appellant Charles T. Doxey. On the night of November 13th, 1884, Doxey's building was burned, but the brick walls remained standing. Doxey's building stood on the line of a public alley, sixteen feet in width. The cornice of the Doxey building projected over this alley. The cornice and wall of the burnt building fell upon the plaintiff's building and destroyed it. The city knew that the wall was dangerous and likely to fall, and was notified of that fact, as was Doxey. Notwithstanding the notice and knowledge, the defendants negligently permitted the wall, weakened and made dangerous by the fire, to remain unsupported for nine days, when it fell, crushing the plaintiff's building.

Our judgment is that no cause of action is stated against the city. A municipal corporation is an instrumentality of government and is not liable for a failure to exercise legislative or judicial powers, nor for an improper or negligent exercise of such powers. *Wheeler v. City of Plymouth*, 116 Ind. 158; *Dooley v. Town of Sullivan*, 112 Ind. 451 (2 Am. St. Rep. 209); *City of Terre Haute v. Hudnut*, 112 Ind. 542; *Faulkner v. City of Aurora*, 85 Ind. 130; *City of Lafayette v. Timberlake*, 88 Ind. 330; *McDade v. Chester City*, 117 Pa. St. 414 (2 Am. St. Rep. 681); *McArthur v. City of Saginaw*, 58 Mich. 357 (55 Am. Rep. 687); *Agnew v. City of Corunna*, 55 Mich. 428 (54 Am. Rep. 383); *Hines v. City of Charlotte*, 40 N. W. Rep. 333; *Kiley v. City of Kansas*, 87 Mo. 103 (56 Am. Rep. 443); *Hubbell v. City of*

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Viroqua, 67 Wis. 343 (58 Am. Rep. 866); *Robinson v. Greenville*, 42 Ohio St. 625 (51 Am. Rep. 857, and note).

The authorities we have collected, to which many more might easily be added, illustrate all phases and postures of the general subject; but in one thing all unite, and that is in affirming that no recovery can in any event be had where the negligence of the municipal corporation consists in failing to perform a legislative, judicial, or discretionary duty, or in simply performing such a duty in an improper method. The decision in *Kiley v. City of Kansas*, *supra*, is directly in point, and applies the rule we have stated to a case in principle precisely like the one before us.

A recovery can be had against a municipal corporation only where it negligently performs or negligently fails to perform a duty in its nature ministerial, and then only in cases where the ministerial duty is imposed by law. There must, in every case, be a duty, since where there is no duty there can be no negligence. It is, indeed, impossible to conceive a case where negligence can exist independent of a duty. It was, therefore, incumbent upon the appellee to show a ministerial duty and its wrongful breach. This he has not done. A municipal corporation owes a duty to those who use its streets to exercise ordinary care to make them safe for passage. It is not without hesitation that some of the courts have assented to this rule, and there once was reason for doubt, for, as a municipal corporation is an instrumentality of government, it is difficult to perceive upon what principle it can be sued, while the sovereignty of which it forms a part enjoys complete immunity. But the question is now closed. Municipal corporations are liable for a negligent breach of a ministerial duty. They are, however, liable only to one to whom they owe that duty, and to him only when the duty concerns some thing over which that duty extends. In many of the cases we have cited it is held that municipal corporations owe a duty only to persons using their streets, and to them only owe a duty to keep the streets

safe for ordinary travel. In order to create a liability the breach of duty must be such, many of the cases say, as to make the streets insufficient, or unsafe, for ordinary travel. We can conceive of no principle and we know of no authority upon which it can be held that a municipal corporation is under a duty to protect the property of a citizen from injury from the walls of an adjacent building belonging to a citizen which the owner's negligence has permitted to become dangerous. Municipal corporations are not charged with the duty of protecting private property. There is, certainly, nothing in the statute which imposes such a duty upon them, and if not in the statute, it does not exist.

The entire current of authority concentrates upon the proposition, that unless the law expressly, or by clear implication, imposes a duty upon a municipal corporation, none can be imposed by construction. Wharton says: "A duty, however, not imposed specifically on a corporation, can not be constructively attached so as to make its neglect the subject of a suit." Whart. Law of Neg., section 257.

Three cases are cited by the appellee. The first, that of *City of Anderson v. O'Conner*, 98 Ind. 168, is not even remotely relevant. This is apparent, without more being said, when it is affirmed that the complaint in that case was to recover damages for a breach of contract.

The second case cited, *Grove v. City of Fort Wayne*, 45 Ind. 429, while it carries the principle on which it proceeds to the utmost verge, decides only that a person travelling on a public street may recover for an injury caused by the falling of an overhanging cornice. Conceding that the decision in that case is correct, it by no means justifies the conclusion that a municipal corporation is liable for the destruction of property by the fall of an adjoining building. The decision, as the opinion shows, is based solely on the proposition that municipal corporations "are bound to keep the streets, in-

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cluding the sidewalks, in a reasonably safe condition for ordinary travel."

The third case cited, *Lowery v. City of Delphi*, 55 Ind. 250, in so far as it has the remotest resemblance to this case, simply announces and enforces the same general proposition. If the plaintiff were here seeking to recover for injuries received while using a street, these decisions would be relevant; but as he seeks to recover for the destruction of a building standing on his own ground, they are totally irrelevant.

We proceed now to the branch of the case involving the rights of the appellant Doxey. His counsel assert that the first paragraph of the complaint is bad, because it does not charge him with negligence. We can not concur with them. The facts stated very clearly show that he was guilty of culpable negligence, and that his negligence was the proximate cause of the appellee's injury. It is charged, much as in the second, that the wall was unsafe and dangerous, that Doxey knew this, and that it constituted a public nuisance. In addition to these allegations, it is also averred that the wall was unsafe and dangerous from the 14th until the 22d of November, 1884, and that the defendant Doxey refused to make it safe or to permit the plaintiff to do so.

To the second paragraph, it is objected by Doxey's counsel that the general averments of negligence are insufficient. This position rests on an undue assumption, for there are specific averments. But if there were not, the objection is not well taken, for it is settled that general averments of negligence are sufficient as against a demurrer. *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196.

The second instruction asked by Doxey was properly refused, for the reason that there was no evidence to which it was applicable. Mr. Doxey testified that "Mr. Coburn, the marshal of the city, came to me the next morning after the fire and said they would take charge of, or appoint policemen to look after, the walls, and have them torn down if necessary. He says, 'You need not bother anything about them ;

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you have lost enough.' I think those were the exact words."

This evidence, and it is the strongest adduced by Doxey, did not warrant an instruction that "Doxey is not liable if the marshal of the city of Anderson and his deputies took charge and control of the premises, preventing any person from going near the ruins until after the walls fell." Waiving all question as to the authority of the marshal to exclude the owner of the building, and waiving, also, all question as to the fault of the instruction in not asserting that control was actually taken without the owner's consent, it was properly refused, because the owner could not shift his responsibility on to the municipal corporation. If there had been any testimony showing that the owner was compulsorily excluded by legal authority, a very different question would have been presented; but all that here appears is, that the marshal informed Mr. Doxey that he would take charge of the walls, and that Mr. Doxey consented that he might do so. The most that can be said of the testimony of Mr. Doxey is, that it proves that he turned the matter over to the control of the marshal, for there was no legal process employed to secure control. At all events, it is quite clear that Doxey did not escape responsibility by acceding to the request of the marshal, for third persons injured by his negligence can not be denied compensation because he delegated or conceded his duties and rights to a city officer.

The judgment against the city of Anderson is reversed, and that against the appellant Doxey is affirmed.

Filed Jan. 25, 1889.

Rechtin v. McGary et al.

No. 13,555.

RECHTIN v. MCGARY ET AL.

SALE.—Delivery on Board Cars.—Vesting of Title.—Execution.—Where one contracts to furnish materials of a certain quality to another, and to deliver them on board the cars consigned to the latter, who is a contractor for a county building, and who agrees to pay for the materials so agreed to be supplied if they are accepted by the board of commissioners and the architect, and materials are shipped in pursuance of the contract to the place of destination, where they are levied on in partial satisfaction of an execution against the consignee, the consignor, if he takes possession of the property while still subject to the levy, and disposes of it for his own benefit, is liable to the sheriff for its value, it being presumed, as against him, that the materials were of the kind which he had contracted to furnish, and title having vested in the consignee upon the delivery on board the cars as agreed.

From the Gibson Circuit Court.

C. A. Buskirk, for appellant.

J. E. McCullough and *J. H. Miller*, for appellees.

OLDS, J.—This case was submitted on an agreed statement of facts in accordance with section 553, R. S. 1881. The facts are as follows:

One Joseph G. Miller, under a contract with the board of commissioners of Gibson county, was furnishing material and erecting a new court-house in the town of Princeton, Gibson county. On the 19th of June, 1885, while Miller was engaged in building the court-house, Rechtin entered into a contract with Miller by which he was to furnish Miller certain wood materials to complete the inside wood-work of the court-house. By the terms of this contract, Rechtin was to deliver the materials on board the cars at the city of Evansville, Indiana, and to furnish good materials, according to the plans and specifications of the architect of the building. In payment for the materials, Rechtin was to receive \$6,850,

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to be paid when they were received by the architect and board of commissioners of Gibson county, the materials to be furnished by Rechtin fit to be put in place, but to be put in place in the building by Miller. Under this contract, Rechtin delivered on board the cars at the city of Evansville, Indiana, certain material to be used in the construction of the court-house, marked the same and consigned it to J. G. Miller, Princeton, Indiana; that, on the 29th day of September, 1885, while the material was on the cars at Princeton, the appellee McGary, as sheriff of Gibson county, levied an execution which he held in favor of appellees Mossman & Mossman against Miller for \$175; and Rechtin afterwards, and before the material was released from the lien and levy of said execution, took possession of the material and disposed of the same for his own use and benefit, and without the knowledge or consent of the appellees; that the material is of the value of \$75, and in the event the court should find that Miller was the owner of the material at the time of the levy, and the material was subject to the levy, judgment should go for \$75 in favor of Hugh D. McGary, and if the court found to the contrary, judgment should go in favor of appellant.

The court below made a finding in favor of Hugh D. McGary for \$75, and rendered judgment in his favor against Rechtin for said amount.

Exceptions were taken to the finding and judgment, and errors are properly assigned.

The question presented to this court is whether the agreed statement of facts shows a cause of action in favor of McGary, in whose favor the judgment was rendered.

This depends upon when the title to the property levied upon passed from Rechtin to Miller by the terms of their agreement. It was agreed between them that the materials to be furnished were to be delivered by Rechtin to Miller on board the cars in the city of Evansville. The agreed statement of facts shows that the property levied upon by McGary, as the

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property of Miller, was delivered on board the cars at the city of Evansville, and marked "J. G. Miller, Princeton, Indiana," and had been conveyed by the railroad company to the town of Princeton, Gibson county, and there levied upon; but it is contended by counsel for the appellant that as it was agreed by Rechtin to "furnish materials of good materials and workmanship" according to the plans and specifications of the architect, which were to be paid for as fast as delivered and received by the architect and board of commissioners, and further agreed that the materials should be satisfactory to the architect and board of commissioners as fulfilling the plans and specifications, the title did not pass until they had been accepted by the architect and board of commissioners; and further, that, the agreement being that the materials should in fact be in accordance with the plans and specifications, and the agreed statement of facts not stating that the materials were in fact in accordance with the specifications, Rechtin could not maintain an action against Miller for their value at the time the levy was made; hence the title had not passed, and they were not subject to be levied upon as the property of Miller. Counsel are correct in their theory that Rechtin could not maintain an action for the value of such materials at the time they were levied upon, for the reason that payment was not to be made until the materials were delivered and received by the architect and board of commissioners; and if an action could be maintained before they had been so received by the architect and board of commissioners, it would be necessary to aver and prove that the materials were in fact in accordance with the plans and specifications. We think that a different question from the one arising in this case; it is not whether Rechtin could maintain a suit for the value, but whether the title had passed at the time of the levy.

By the agreement between Miller and Rechtin, Rechtin was to furnish goods of a certain kind and quality; he was to make the selection and deliver them to Miller at a certain

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specified place. He made the selection of the goods in question and delivered them at the place named in fulfilment of his contract; he had no further act to do in connection with these specific goods, and if they were in fact such materials as his contract called for, the architect and board of commissioners would be bound to receive them, for, if they complied with the plans and specifications, it was all they could ask or demand, and the presumption would be that they would receive and accept them.

It does not appear from the statement of facts that Miller, the architect, or the board of commissioners ever objected or refused to accept the materials or made any claim that they were not such as called for by the specifications, or that the materials are not in fact such as Rechtin contracted to furnish; and Rechtin having furnished and put them on the cars in pursuance, and in fulfilment, of his contract, in the absence of any showing to the contrary it will be presumed as against him that they were such materials as he contracted to furnish; and the placing of such materials on the cars at Evansville constituted a delivery of the goods by Rechtin to Miller and the title to the property immediately vested in Miller, and it was liable to be levied upon to satisfy an execution against Miller. See 1 Benjamin Sales, pp. 443, 446, 463, section 512; *Bartlett v. Jewett*, 98 Ind. 206; *Scudler v. Bradbury*, 106 Mass. 422 (13 Am. Law Reg. 462); *Cloud v. Moorman*, 18 Ind. 40; *Krulder v. Ellison*, 47 N. Y. 36.

There was no error in the finding and judgment of the court below.

The judgment is affirmed, with costs.

Filed Jan. 26, 1889.

Mattinger v. The Lake Shore and Michigan Southern Railway Co.

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119 49

No. 13,472.

MATTINGER v. THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY CO.

BILL OF EXCEPTIONS.—*Failure to State that it Contains all the Evidence.*—*Supreme Court.*—*Practice.*—Where a bill of exceptions does not contain the statement, “this is all the evidence given in the cause,” or equivalent words, questions which depend upon the evidence will not be considered.

From the DeKalb Circuit Court.

W. L. Penfield, F. K. Blake and H. J. Shafer, for appellant.

J. H. Baker, G. C. Greene and O. G. Getzen-Danner, for appellee.

BERKSHIRE, J.—This suit was instituted before a justice of the peace. The complaint, when the cause was tried, was in one paragraph.

This is an action against the appellee by the appellant, depending upon what is known as the “Stock Law.”

The complaint charges that, on the 22d day of July, 1884, the defendant was a corporation, operating a line of railroad which passed through the county of DeKalb, in the State of Indiana, and that on said day, at said county, its employees, operating a locomotive engine upon its said line of road, ran the same over a cow belonging to the appellant, thereby killing her; that she was of the value of sixty-five dollars, and that at the point where she went upon the railroad track it was not securely fenced.

The case was tried by a jury, and a special verdict returned. The appellant filed a motion for a new trial, which was overruled by the court, and a judgment rendered for the defendant.

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The only error which the appellant assigns is the overruling of his motion for a new trial.

The motion contains several reasons, but in their brief the able counsel for the appellant confine the discussion to certain of them which relate to the admission and exclusion of testimony offered upon the trial, thereby waiving all other questions.

There is what purports to be a bill of exceptions containing the evidence in the record, but it fails to state, "this is all the evidence given in the cause;" nor does it contain equivalent words. There is nothing in the record bringing the case within section 630, R. S. 1881.

Following the numerous decisions of this court, which hold that the evidence is not properly in the record, and that questions depending upon it can not be considered, unless the bill of exceptions contains the words, "this is all the evidence given in the cause," or their equivalent, we must hold that the questions which are discussed by appellant's counsel are not in the record so that we can consider them. *Kleyla v. State, ex rel.*, 112 Ind. 146; *Brickley v. Weghorn*, 71 Ind. 497; *Gazette Printing Co. v. Morss*, 60 Ind. 153; *McDonald v. Elfes*, 61 Ind. 279; *Sessengut v. Posey*, 67 Ind. 408.

The judgment is affirmed, with costs.

Filed Jan. 26, 1889.

Taggart *et al.* v. Ratts.

No. 13,496.

TAGGART ET AL. v. RATTs.

JUSTICE OF PEACE.—*Jurisdiction.*—*Appearance.*—*Waiver.*—A party who appears before a justice of the peace and participates in a trial before him, can not object in the Supreme Court, for the first time, that the justice had no authority to try the case.

SAME.—*Appeal.*—*Reduction of Judgment.*—*Costs.*—Where judgment is rendered for seventy dollars before a justice of the peace, and on appeal the circuit court adjudges that the plaintiff is entitled to recover fifty dollars tendered by the defendant, "and the sum of twenty-two dollars," there is no reduction of the judgment of the justice and the defendant is not entitled to costs.

From the Clark Circuit Court.

J. K. Marsh, H. A. Burt and *J. E. Taggart*, for appellants.

J. G. Howard, J. F. Read and *M. Z. Stannard*, for appellee.

ELLIOTT, C. J.—The appellee brought this action before William A. Pearcey, justice of the peace. The appellants applied for a change of venue, their application was granted, and the case sent to Richard H. McNew, a justice of the peace of Oregon township. The appellants appeared before the latter justice and demanded a trial by jury. The jury returned a verdict against them, on which a judgment was entered. From this judgment an appeal was prosecuted to the circuit court. No question was made either in that court or before McNew as to his authority to proceed in the case, but the transcript of McNew does not show how the case came before him.

We think it quite clear that the appearance of the appellants before the latter justice of the peace precludes them from successfully objecting, for the first time, in this court that he had no authority to try the case.

The judgment before the justice of the peace was for seventy dollars, and in the circuit court for twenty-two $\frac{72}{100}$

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dollars, but the reduction of the amount of the recovery was, as the record affirmatively shows, caused by a tender of fifty dollars made to the appellee. This tender was made in full of the amount claimed by the appellee, and as it was less than the amount due it was ineffective. The verdict of the jury is, in effect, a special one, showing specially the tender and the amount due, and we think that on this verdict the judgment of the circuit court was not erroneous, although not strictly the appropriate formal one. We think, also, that the record shows that there was no reduction of the amount of the judgment rendered by the justice, for it shows that the court adjudged that the plaintiff was entitled to recover the fifty dollars tendered, and the sum of twenty-two $\frac{72}{100}$ dollars, making in the aggregate the sum of seventy-two $\frac{72}{100}$ dollars, thus showing that he was entitled to recover all he claimed. There was, therefore, no error in refusing to tax costs against the appellee. *Barnes v. Bates*, 28 Ind. 15.

Judgment affirmed, with five per cent. damages and costs.

Filed Jan. 26, 1889.

No. 13,463.

LUCAS, ADMINISTRATOR, v. DONALDSON, ADMINISTRATOR.

117	130
156	510

DECEDENT'S ESTATE.—*Estate of a Deceased Administrator.*—*Causes for which Suit against Can be Maintained.*—The estate of a deceased administrator can not be subjected to the costs of a suit, unless the administrator had neglected some duty, or unless he had been guilty of some default, for which a suit might have been maintained against him had he lived.

SAME.—*Bond of Deceased Administrator.*—*Suit Upon.*—Suit can be maintained on the bond of a deceased administrator for the violation of any of the duties of his trust. Section 2458, R. S. 1881.

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SAME.—Settlement of Trust by Administrator.—It is the duty of the executor or administrator to take possession of trust funds which remain in the hands of the decedent at the date of his death, and to settle his accounts in relation to the trust. The administrator or executor is not bound to proceed to the execution of the trust, but must preserve the fund for those entitled, and must pay it over to them, or to some one duly authorized to receive it, under the order of the proper court.

SAME.—Pleading.—Complaint against an Estate.—What it Must Contain.—A complaint against an estate need not be technically formal, but it must state the facts essential to show that the estate is liable under the statute.

From the Montgomery Circuit Court.

L. J. Coppage, for appellant.

G. W. Paul, J. E. Humphries, W. E. Humphries and *W. M. Reeves*, for appellee.

MITCHELL, J.—Lucas, as administrator *de bonis non* of the estate of Louisa C. O'Rear, filed a claim against the estate of Joseph O'Rear, deceased, of which Donaldson was the administrator. The complaint, or statement of the claim, was in two paragraphs. In the first it was alleged that Mrs. O'Rear died in the county of Montgomery—the date of her death not being stated—and that Joseph O'Rear was afterwards duly appointed administrator of her estate, and that while so acting he collected six hundred dollars due the estate from one Patterson, the latter having executed his promissory note payable to the decedent for that sum in her lifetime. It is averred that Joseph O'Rear died in the year 1884, after having collected the money due on the note above mentioned, and that the plaintiff, Lucas, was afterwards appointed administrator *de bonis non* of the estate of Louisa C. O'Rear, and that the defendant, Donaldson, was the duly appointed and qualified administrator of the estate of Joseph O'Rear. It is alleged that the above mentioned "sum of six hundred dollars is due the plaintiff, with the interest thereon."

The averment in the second paragraph is, that the defendant is indebted to the plaintiff in the sum of eight hundred dollars for money collected by Joseph O'Rear while admin-

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istrator of the estate of Louisa C. O'Rear, deceased. To this paragraph there is a bill of particulars attached which shows that the money claimed to be due is that collected on the Patterson note.

The question is made here that the complaint does not state facts sufficient to constitute a cause of action. It is very certain that neither paragraph of the complaint states a cause of action against the estate of Joseph O'Rear. The facts stated show nothing more than that the intestate had, prior to his death, collected six hundred dollars, and interest, due on a note from one Patterson, to the estate of which he was the administrator. It may be inferred that he died with the proceeds of the note in his hands, but there is no suggestion that he was in default in respect to any duty required of him by the statute, or that he had in any way violated his trust as administrator. Surely the estate of a deceased administrator can not be subjected to the costs of a suit, unless the administrator had neglected some duty, or unless he had been guilty of some default, for which a suit might have been maintained against him in case he had lived. Besides, it does not appear that the amount collected from Patterson constituted the entire sum collected by the deceased administrator, or that the state of his account was such that a judgment for the sum so collected would effect a final settlement of his account with the estate. Upon what principle can this isolated item be singled out, and a suit, in the nature of a common law action, maintained for it against the administrator of Joseph O'Rear?

The duty of taking possession of trust funds which remain in the hands of a decedent at the date of his death, and of settling his accounts in relation to the trust, is devolved primarily upon his executor or administrator. The latter is not bound to proceed in the execution of the trust, but must preserve the fund for those entitled, and pay it over to them or to some one duly authorized to receive it, under the order of the proper court. *Silvers v. Canary*, 114 Ind. 129.

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It is to be presumed, until the contrary appears, that the administrator of Joseph O'Rear obtained possession of all funds remaining on hand belonging to the estate of Louisa C. O'Rear, and that he will pay them over to the persons entitled; or, if there be doubt or dispute, that he will report them with an account of the doings of his intestate to the proper court in due time.

If an unreasonable delay occurs, an application to the court having control of the administrator will be effectual to produce the fund and the account, or a statement of the reasons why they are not forthcoming, when, if the facts justify it, a suit upon the bond of his predecessor will accomplish the whole duty, and exhaust the power of the administrator *de bonis non* in that behalf.

The remedy against the representatives of a deceased administrator is wholly statutory, the rule of the common law being that a *devastavit* committed by an executor or administrator was a personal tort, which died with the person. *Young v. Kimball*, 8 Blackf. 167.

Accordingly, it was formerly held that an administrator *de bonis non* could only recover such of the goods, chattels and choses in action as remained unadministered, and which could be distinctly designated and distinguished as the property of his intestate, and that he could not call the representative of a deceased administrator to account for property wasted or converted, even by a suit upon the bond. *State, ex rel., v. Gooding*, 8 Blackf. 567; *Anthony v. McCull*, 3 Blackf. 86; *Ferguson v. Sweeney*, 6 Blackf. 547; *Carrick v. Carrick*, 23 N. J. Eq. 364; *Potts v. Smith*, 3 Rawle, 361; *Rowan v. Kirkpatrick*, 14 Ill. 1; *Newhall v. Turney*, 14 Ill. 338; *Slaughter v. Froman*, 5 Monroe, 19; *Cheatham v. Burfoot*, 9 Leigh, 580; *Wilson v. Ames*, McAr. & M. 278.

By section 382, Revised Statutes of 1843, p. 557, it was provided that "The executors and administrators of every person, who, as executor, either of right or in his own wrong, or as administrator, shall have wasted or converted to his own

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use, any goods, chattels, or estate of any deceased person, shall be chargeable in the same manner as their testator or intestate would have been if living."

This statute was available to heirs, legatees, creditors, etc., but a succeeding administrator had no power to sue under its provisions. *Young v. Kimball, supra*.

Subsequently other modifications of the statute followed, and by section 2458, R. S. 1881, now in force, creditors, heirs, legatees, or surviving or succeeding executors or administrators, are authorized to sue on the bond of any executor or administrator in certain specified cases, and for the violation of any of the duties of his trust. *Day v. Worland*, 92 Ind. 75; *Graham v. State, ex rel.*, 7 Ind. 470; *Myers v. State, ex rel.*, 47 Ind. 293.

The infirmity in the complaint in the present case is a radical one. The action is not upon the bond of the deceased administrator, nor does the complaint show any breach of statutory duty whatever, or other violation of the duties of his trust by the intestate. It does not appear that any debts remain unpaid, or that there is any property to be administered, or that there is any other reason for the intervention of an administrator *de bonis non* than to obtain possession of the money in dispute, and distribute it to the persons entitled. If nothing else remains to be done, the intervention of a new administrator is wholly unnecessary, as in case the money is in the hands of the administrator of Joseph O'Rear, the court can order him to pay it to those entitled, and if the property has all been administered and converted, the proper heirs and distributees of Louisa C. O'Rear can sue under section 2458, above.

We agree with counsel that a complaint against an estate need not be technically formal, but it must state the facts essential to show that the estate is liable under the statute. In that respect the complaint under consideration is wholly deficient.

As to the proper method of accounting, it is only neces-

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sary to say that if it shall appear that the deceased administrator distributed the residue of the estate, after paying the debts and costs of administration, to those legally entitled, or if he paid out the money in good faith to, or for the benefit of, the proper heirs of his intestate in such manner as that he would have been entitled under the law to credit therefor in case of a final settlement made by him while living, or if that has since been done by his administrator, the estate can not be held further liable. *Searcy v. State, ex rel.*, 93 Ind. 556; *Reagan v. Long*, 21 Ind. 264; *Leach v. Prebster*, 35 Ind. 415.

The foregoing considerations lead to a reversal of the judgment.

Judgment reversed, with costs.

Filed Jan. 29, 1889.

117	144
117	391
118	57
117	144
126	555
117	144
122	305

No. 14,140.

MOORMAN v. WOOD.

PROMISSORY NOTE.—Judgment.—Assignment.—Endorser.—Where the payee of a promissory note obtains a judgment thereon against the makers, which he assigns, he can not afterwards maintain an action on the note against an accommodation endorser.

SAME.—Who Prima Facie an Endorser.—Where the name of one not the payee is written on the back of a negotiable promissory note, his situation is *prima facie* that of an endorser, and the payee is bound to take notice of his rights as such.

SAME.—Release of Endorser.—Redemption.—Contract.—Statute of Frauds.—Where a creditor bids in the property of the debtor at a sale under a mortgage, and induces the latter not to redeem by promising to take a sheriff's deed and hold the land, which is of value sufficient to satisfy

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both his claim and the mortgage debt, as a security for the payment of his claim, but violates his contract, he can not afterwards maintain an action against a surety. Such a contract is not within the statute of frauds.

ATTORNEY AND CLIENT.—Negligence.—Damages.—Where an attorney negligently fails to take judgment against himself as endorser of a promissory note which he is employed to collect, he is liable to his client for the damages sustained by him.

SAME.—Burden of Proof.—The burden is upon an attorney sued for negligence to show that the judgment taken by him was sufficient to protect his client, and to do this he must show that the property of the persons against whom judgment was taken was unencumbered by prior liens, or that the client, by assignment, obtained the full value of his claim.

SAME.—Taking Judgment.—Diligence.—An attorney who can, by the exercise of reasonable skill and diligence, obtain judgment before the debtor's property is encumbered, is bound to do so, and the failure of the client to redeem from liens which, through his negligence, are prior to the judgment, will not release him from liability.

From the Jay Circuit Court.

W. A. Thompson, A. O. Marsh and J. W. Thompson, for appellant.

E. L. Watson and J. S. Engle, for appellee.

ELLIOTT, C. J.—The first paragraph of the appellant's complaint counts on a promissory note, in which the appellant is the payee. The second charges that the defendant so negligently and unskilfully conducted an action in which he was employed as an attorney by the plaintiff as to cause the plaintiff great loss. The second paragraph of the answer is addressed to the first paragraph of the complaint. This paragraph of the answer alleges that the defendant endorsed the note for the accommodation of the makers; that the appellant sued on the note and recovered judgment against the makers; that, at the time the judgment was entered, Jacob B. Blazer, one of the makers, was the owner of two hundred acres of land of the value of ten thousand dollars, and that the judgment became a lien on this land; that the land, over

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all encumbrances, far exceeded in value the amount of the judgment; that the land was ample security for the judgment obtained on the note; that while the judgment was still in full force the appellant assigned all of his interest in it to Cornelius Corwin.

The assignment of the judgment transferred the lien to Corwin, and it seems clear that Moorman could not enforce payment from the endorser after parting with the judgment against the makers of the note. As to the makers, the note was unquestionably merged in the judgment. *Bowen v. Eichel*, 91 Ind. 22, and authorities cited.

We confess that we are unable to perceive how the assignee could hold the judgment against the makers, and the assignor still have a right of action against the endorser. The assignment of the judgment carried the note bound up in it, and if there is any right of action against the endorser it must be in the assignee of the judgment. The assignee became the exclusive owner of the judgment, and as such owner he was invested with all its incidents. We can not conceive upon what principle it can be held that one party may have a right of action against an endorser, while another has the whole claim against the makers. One incident of the judgment was the lien, and as this lien was in the assignee of the judgment, Moorman did not, and could not, control the security which it afforded. The right to this security being in Corwin, there was nothing to which the endorser could have resorted if Moorman had enforced payment from him. In the event that the endorser should pay the note, he would unquestionably be entitled to be subrogated to the rights of the creditor of the principal, and might take, as an indemnity, the security held by the creditor. *Sheldon Sub.*, sections 119-123; *Brandt Sur.*, sections 370-373; *Sample v. Cochran*, 82 Ind. 260.

But Moorman, although he once held a judgment lien, holds no security, for the lien of the judgment has passed from him to his assignee, and it must follow that the only

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privity of contract is that which exists between the assignee of the judgment and the appellee.

We agree with the appellant's counsel that a pleading must proceed on a definite theory, and that it must be sufficient on the theory adopted. *Mescall v. Tully*, 91 Ind. 96, and cases cited; *Lane v. Schlemmer*, 114 Ind. 296, and cases cited. We also recognize and approve the doctrine declared in the cases cited by appellant, that a party will be held to the theory he assumes to develop. *Graham v. Nowlin*, 54 Ind. 389; *Reissner v. Oxley*, 80 Ind. 580; *Carver v. Carver*, 97 Ind. 497, 516; *Buchanan v. State, ex rel.*, 106 Ind. 251; *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544, 564. But we can not agree that the opposing counsel may assume, without proof, what the theory of a pleading is, and this we think the learned counsel of the appellant have done in this instance.

We can not see that the decision in *Rodenbarger v. Bramblett*, 78 Ind. 213, supports appellant's contention. It may be that if Moorman had remained the owner of the judgment he could have maintained an action against the appellee, but he divested himself of all right in the judgment, and thus transferred the security. If Wood should pay the note to Moorman, the payment would not destroy the rights of Moorman's assignee; he might still enforce his judgment. This must be true, or else it must be true that a payee may obtain judgment against the makers of a note, assign that judgment, then accept payment from an accommodation endorser, and thus extinguish the judgment as in favor of his assignee, although the assignee had the prior right and ample security. This result can only be avoided by holding that the entire debt evidenced by the note passes, as against a surety or an endorser, to the assignee of the judgment. This conclusion is the only one which will preserve the endorser's right of subrogation, and, as this right must be preserved, this is the only valid conclusion. The note is not the debt, it is simply the evidence of the debt, and when the debt

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passed to Corwin, Moorman was no longer in a situation to extinguish it, or to impair his assignee's lien, or to destroy the endorser's right of subrogation.

The case of *Noble v. Merrill*, 48 Maine, 140, is not in point, for what was there held is, that the assignment of a part of a judgment does not extinguish the part not assigned. There is no such question here. The question here is, can a creditor, who has assigned the whole judgment taken on a promissory note, recover judgment against an endorser?

An entire demand, such as a promissory note constitutes, can not be split into parts, and, as the answer avers that the judgment was taken on the note, it is made to appear, *prima facie*, at least, that it was for the entire demand. Especially is this so, for the reason that the answer avers that the judgment was rendered on the note for \$——, since the most that can be said, in any event, is that there is some uncertainty in the pleading. The remedy for such a defect is by motion.

The name of the payee is written in the body of the note, and Wood's name is written on the back. *Prima facie*, the situation of Wood is that of an endorser, as the note is negotiable by the law merchant. The law imports into the endorsement of a promissory note governed by the law merchant, a contract which, as a general rule, can not be contradicted by parol evidence. *Pool v. Anderson*, 116 Ind. 88; *Knopf v. Morel*, 111 Ind. 570; *Stack v. Beach*, 74 Ind. 571; *Kealing v. Vansickle*, 74 Ind. 529.

We need not here inquire whether there are, or are not, exceptions to the general rule, for all that we are required to decide is that the endorsement created, *prima facie*, the liability of an endorser. We are not concerned with a question between the debtors themselves as to their respective rights against each other, but our investigation relates solely to the rights of an endorser against the payee. The question is, therefore, essentially different from what it would be if the case were one between the makers and the endorser. *Knopf v. Morel*, *supra*.

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The appellee occupied a position so far analogous to that of a surety as to be entitled to be subrogated to the securities held by the creditor. *Pownal v. Ferrand*, 13 Eng. C. L. 230; *Carter v. Black*, 4 Dev. & Bat. 425.

The note on its face informed the payee of the contract of the appellee, and that it was that of an endorser. *Hoffman v. Butler*, 105 Ind. 371. This information charged the payee with notice of the rights of the appellee under that contract, and he was, therefore, bound to know that the relinquishment or transfer of a lien which secured the payment of the note relinquished his right to enforce payment from the endorser. This must result, if it be true, as it certainly is, that an endorser is entitled to be subrogated to the security held by the creditor. *Commercial Nat'l Bank v. Henninger*, 105 Pa. St. 496; *Union Nat'l Bank v. Cooley*, 27 La. Ann. 202; *Stallings v. Bank of Americus*, 59 Ga. 701; *Crawford v. Logan*, 97 Ill. 396; *Pacific Bank v. Mitchell*, 9 Metc. 297; *Trimble v. Thorne*, 16 Johns. 152; *Wallace v. McConnell*, 13 Peters, 136.

The endorser who pays a note is undoubtedly entitled to his recourse against the makers, and this recourse he can not have where the judgment against the makers has been assigned.

The question here is not whether the judgment taken against the makers extinguished the debt, but the question is, what was the effect of the assignment of the judgment upon the right of Moorman to sue the endorser? Such cases as *Perry v. Saunders*, 36 Iowa, 427, and *Shields v. Moore*, 84 Ind. 440, can, therefore, exert no controlling influence in the case. The payee of the note by assigning the judgment stripped himself of all right, and made it impossible that the endorser should, as against him, assert the right of subrogation, thus making it evident that there is no right of action in him. What the rights of Corwin, the assignee, are, against the endorser, is quite another question.

The ingenious argument of appellant's counsel rests on an

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illicit assumption; they assume that Wood can not defeat Moorman unless he shows a full and consummated right to subrogation. This assumption is utterly indefensible. It was enough for the endorser to show that Moorman had made it impossible that the right of subrogation could ever exist. This rule is asserted in the almost countless cases where it is held that the release of any security or right of recourse releases the endorser. Moorman certainly released these rights so far as he could, and in him, at least, there is no cause of action, whatever may be the rights of the assignee of the judgment.

It is not the right of Moorman to challenge the validity of his own assignment, much less has he a right to demand that the appellee should show that his own assignee was not a mere volunteer.

If the fourth paragraph of the answer professed to answer only the first paragraph of the complaint instead of assuming to answer both the paragraphs, we should have no difficulty in holding it to be sufficient, for it pleads substantially the same facts as the second. But the question whether the fourth paragraph answers the cause of action set forth in the second paragraph of the complaint can not be disposed of upon the grounds on which the second paragraph of the answer is held to be good. The appellee was guilty of a tort, for, as he confesses—by not denying—he negligently sacrificed the interests of his client. His breach of professional duty gave his client a complete right of action. This right of action was independent of that resting on the note, and we can not perceive how the assignment of the one transferred or extinguished the other. It may be that the answer is good as a plea in mitigation of damages, but it is not good as a plea in bar, and, therefore, as it goes to the whole claim, it is bad. We are inclined to the opinion that the damages arising from the appellee's breach of duty may be lessened by proving the value of the judgment obtained by him for his client, but we are unwilling to hold that he can completely defeat the

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action by showing that the appellant assigned the judgment he obtained. It was the duty of the appellee to have promptly taken judgment against the makers of the note and against himself, or else not to have accepted employment from the appellant. Where an attorney is confessedly guilty of a tort, springing from a neglect of duty, he must show that no loss accrued to his client, or he must respond in damages. He must aver and prove that the judgment he did take was sufficient to fully protect his client, and he can not put upon the client the burden of showing that the judgment fully compensated him. In order to accomplish this result the negligent attorney must show that the property was free from encumbrances, or that the client, by assignment, secured the full value of his claim. He has no right, in such a case as this, to demand that the courts should presume that there were no liens, nor has he a right to demand that the courts should compel the client to redeem from prior liens, nor has he a right to demand that the courts should presume that the full value of the claim was realized from the assignment of the judgment.

The answer under immediate mention not only fails to show that there were no prior encumbrances on the land on which the judgment became a lien, but, on the contrary, it avers that there were such liens. In view of the fact that there was a breach of duty, which, as the complaint avers, and as the answer admits, caused the appellant to lose his claim, the wrong-doer can escape liability only by showing that the loss must have resulted even if he had done his duty, and this answer is far from showing this, for it is not averred that there were any liens on the land of the debtor when the appellee undertook to collect the note, nor is it averred that a judgment, if taken seasonably, would not have constituted the paramount lien.

Moorman had a right, as against the attorney guilty of neglecting his duty, to sell the judgment for what it would bring, provided that he acted in good faith and with reason-

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able diligence. The attorney has no right to ask immunity from the consequences of his own wrong, upon the ground that the client should have bought the encumbered land, and redeemed from the encumbrances. An attorney who can, by the exercise of reasonable skill and diligence, obtain judgment before the debtor's property is encumbered, is bound to do so. He has no right to place his client's interests in jeopardy, and they are in jeopardy wherever there are prior liens on the debtor's property. Not every creditor can redeem from prior encumbrances, and to require him to do so, when care, diligence and skill on the part of the attorney would relieve him of that burden, is an inexcusable breach of duty.

Where the client shows negligence, the law justly casts upon the attorney the burden of showing an adequate excuse. If diligence would have been ineffectual, it is for the attorney to show it. *Bourne v. Diggles*, 2 Chit. 311; *Brock v. Barnes*, 40 Barb. 521; *Howell v. Ransom*, 11 Paige, 538; *Jennings v. McConnel*, 17 Ill. 148; *Godefroy v. Jay*, 7 Bing. 413.

There is reason for extending this rule, none for its abridgment. In this instance the complaint avers that the defendant "fraudulently refused and neglected to take judgment against himself," and that "he so carelessly, negligently and unskilfully conducted the matter of collecting the judgment and claim, that by his delay, carelessness and want of skill he did not collect the debt, and the debtors became insolvent and left the State." The answer fully confesses the truth of these allegations, but falls far short of avoiding them.

One who assumes the profession of an attorney and counsellor at law, takes upon himself important duties and heavy responsibilities. He occupies a position of trust and confidence, and his client has a right to demand of him that he possess reasonable learning and skill, that he shall exercise with reasonable care and diligence that skill, and that he shall exercise it in the utmost good faith. This has ever been the law. Even when lawyers accepted no compensation,

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the rule was unfalteringly enforced, and it is now, when compensation is not a matter of favor, but of right, more than ever the duty of the courts to give it full force. If men assume duties they can not discharge, or will not perform, they must respond in damages to those injured by their neglect or failure.

The third paragraph of the answer is directed to the first paragraph of the complaint, and is good. The substance of it is this: The land on which Moorman's judgment was a lien was sold on a decree foreclosing a prior mortgage, and bought by him; the makers of the note made preparations to redeem, and so informed him; he agreed with them that if they would not redeem he would, at the expiration of the year allowed for redemption, take a sheriff's deed, and hold the land as security for the payment of his judgment against them; the land was more than sufficient to pay the mortgage and judgment liens. Moorman incapacitated himself from performing his contract by assigning the sheriff's certificate to Allen T. Lewis, by whom a deed was received from the sheriff, investing him with title.

The appellee's principals had a right to redeem the land. This right they yielded in consideration of Moorman's promise. There was, therefore, a contract resting on a sufficient consideration. The contract was not within the statute of frauds, for it is well settled that a contract preserving to a redemptioner his right, or purchasing it from him, is not within the spirit or letter of the statute. *Tinkler v. Swaynie*, 71 Ind. 562; *McOuat v. Cathcart*, 84 Ind. 567; *Butt v. Butt*, 91 Ind. 305; *Rector v. Shirk*, 92 Ind. 31; *McMakin v. Schenck*, 98 Ind. 264; *Cox v. Ratcliffe*, 105 Ind. 374; *Griffin v. Coffey*, 9 B. Mon. 452; *Martin v. Martin*, 16 B. Mon. 8.

The ruling proposition is well stated in *Cox v. Ratcliffe*, *supra*, where it was said by MITCHELL, J., that "Such a contract is not void within the statute of frauds, and if the purchaser was thereby thrown off his guard, and in reliance thereon failed to redeem, the contract will be enforced even

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though no money was paid to secure such extension." This doctrine is most just and equitable. To permit a man who induces another to yield a right to redeem, to repudiate his contract, and thus defeat a redemption, would shock every right-thinking man's sense of justice.

In such cases as this, the redemptioner has an existing interest in the land, and he acquires no new estate by the postponement of the time for redemption, nor does the holder of the sheriff's certificate part with any estate in the land. All that the latter does is to grant the redemptioner time in which to exercise his pre-existing right. It is this element which distinguishes this case from *Rucker v. Steelman*, 73 Ind. 396, and cases of the same class.

For the error in overruling the demurrer to the fourth paragraph of the answer, the judgment is reversed.

Filed Jan. 29, 1889.

117	154
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No. 12,347.

GOUDY v. WERBE ET AL.

PARTNERSHIP.—Sale by One Partner to Another.—Agreement to Pay Firm Debts.—A sale by one partner to another of his interest in the firm property, the purchasing partner agreeing in consideration of the transfer to pay the firm debts, vests title in the latter, in the absence of fraud, and he becomes individually liable to the partnership creditors.

EXEMPTION FROM EXECUTION.—Partnership Property.—Severance of Interest.—A partner is not entitled to claim firm property as exempt from execution, but if a severance takes place, or if one partner becomes the owner of the whole of the partnership property by purchase from his co-partner, then an exemption may be claimed.

SAME.—When Severance May Take Place.—Partners, acting in good faith, have a right to sever their joint interest in the firm property by con-

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tract of sale from one partner to another, or by a division of the property between them, at any time before the firm creditors obtain a lien thereon, and thereafter claim an exemption from execution, although at the time of the severance the firm be insolvent.

WITNESS.—*Examination of.*—*Leading Questions.*—Unless it appears that the trial court abused its discretion in allowing leading questions to be put to a witness, a judgment will not be reversed on that account.

From the Marion Superior Court.

H. J. Milligan, for appellant.

H. C. Allen, for appellees.

OLDS, J.—This is an action of replevin brought by appellee Werbe against appellant and appellee Plummer. Plummer filed a disclaimer in the court below and is only a formal party.

The court made a special finding of facts, and stated conclusions of law thereon. Appellant excepted to the conclusions of law, and filed a motion for a new trial, which was overruled, and judgment entered for appellee Werbe. The facts found by the court are as follows:

On November 27th, 1883, Henry Schnull and William A. Krag recovered three several judgments against appellee Werbe and one Ruth Domauget, before Charles B. Feibleman, a justice of the peace, in Indianapolis, as follows: One for \$166.40 and costs; one for \$181.64 and costs, and one for \$167.25 and costs. It being made to appear by affidavit that delay would endanger their collection, on the same day executions were issued on said judgments and placed in the hands of the appellant, Goudy, as constable. On the same day appellant, as constable, levied said executions on the property described in the complaint as the property of the firm of E. F. G. Werbe & Co., composed of appellee Werbe and Domauget, and took possession of the property.

At the time of said levy, and for a long time prior thereto, appellee Werbe was a married man and a householder, residing in the city of Indianapolis with his family.

On November 21st, 1883, the firm composed of Werbe

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and Domauget were carrying on the business of retail grocers in the city of Indianapolis, and being indebted to Schnull & Krag for groceries theretofore sold them, they executed to Schnull & Krag their three promissory notes in settlement of said indebtedness, payable one day after date, signed by the firm name of E. F. G. Werbe & Co., and it was upon these three notes that the judgments were rendered. The suits on the notes were commenced November 24th, 1883, and summons served the same day, returnable on November 27th, 1883, at nine o'clock A. M. After the service of said summons, to wit, November 26th, 1883, Werbe & Co., being indebted to Stephens & Co., of Cleveland, Ohio, in the sum of \$400, settled with them by giving them part of the goods purchased of Stephens & Co., which constituted part of the stock of Werbe & Co., to the amount and value of \$250, and for the balance of the debt to Stephens & Co., executed a chattel mortgage on the other goods and property of the firm. On the same day, November 26th, 1883, Werbe and Domauget entered into a written agreement dissolving the partnership existing between them, and in consideration of \$200 paid Domauget by Werbe, and in consideration that Werbe assumed and agreed to pay all the debts and liabilities of the firm of every kind and nature, Domauget sold and transferred to Werbe all her right and interest in the firm business and all the property held and owned by them as such partners, of every nature and kind, particularly describing some portion of the property which was to be held and owned by Werbe in his own right exclusively; that Domauget was the mother-in-law of Werbe; she was sixty-five years old, was in feeble health, and was making her home with Werbe, having little or no knowledge of the business. In pursuance of the written contract, the firm was dissolved on the 26th day of November, 1883, and Domauget received \$200 cash, and Werbe took the firm assets and assumed the firm debts. Werbe took exclusive possession of the prop-

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erty, including the property involved in this case, and thereafter held it.

At the date of the dissolution the assets of the firm consisted of merchandise of the value of \$762.48, and small accounts, aggregating \$1,396.95, but only of the value of \$137.52, in addition to the \$200 paid Mrs. Domauget.

At the date of dissolution the firm was indebted to various creditors in the sum of \$800, after payment of Stephens & Co.'s debt. Werbe had no individual property, but was indebted on a judgment in the sum of \$200. Mrs. Domauget had no property except her interest in the firm.

On the morning of November 27th, 1883, at 10 o'clock, Werbe and Domauget, without fraudulent intent, voluntarily entered their appearance to the actions that day filed against them before T. W. Pease, a justice of the peace, and by agreement judgments were entered in said cases upon the firm debts as follows: In favor of Blanton, Watson & Co. for \$71.80, and costs; in favor of Byram, Cornelius & Co., \$49.42, and costs; and in favor of Raschig for \$55.80. Executions were at once issued on said last described judgments, and placed in the hands of Hiram Plummer, a duly qualified constable, who at once levied the executions upon all of the property turned over by the firm of Werbe & Co. to Werbe on the preceding day, and including the property in this case. Appellant Goudy levied his executions later in the day on the same property.

Before the day of sale, Werbe filed with said constables Plummer and Goudy his schedule of all his property of every nature, in due form of law, properly executed and verified, which schedule included the property involved in this case and claimed to be exempt. Werbe thereupon demanded that the property in question be set off to him as exempt, but Plummer took and sold upon his execution all the property save what was so claimed as exempt, and left for Goudy only the property claimed as exempt, the same being of the value of \$524. Goudy refused to deliver said property to Werbe,

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but claimed it was firm property, and not exempt from execution, and after the commencement of this suit sold said property as the property of the firm of Werbe & Co.

At the time of the dissolution and transfer from Domauguet to Werbe, neither said Domauguet nor Werbe intended or designed to cheat, defraud or hinder or delay Schnull & Krag, or any other creditor, nor was the transfer made for the purpose of securing an exemption.

As a conclusion of law the court found for the plaintiff Werbe; that he was entitled to a return of the property so sold, to a personal judgment for the value thereof, the return of the property to act as a satisfaction of the judgment to be rendered. The judgment provided that Werbe was the owner and entitled to the possession of the property at the time of the commencement of this suit, and that Goudy unlawfully detained the same.

It is contended by counsel for the appellant that the facts found by the court entitled him to judgment in his favor, and if they do not, the evidence shows a state of facts different from that found by the court.

It is further contended by counsel, that the facts found by the court show such a disposition of the firm property by the firm of Werbe & Co. as operated as a fraud against the creditors, and that such transfer of the firm property from the firm to Werbe by Domauguet selling her interest in the property to Werbe, when the firm was insolvent, in consideration of \$200, and Werbe's agreement to pay the firm debts, is void as to the creditors; that this is true notwithstanding there was no moral turpitude on the part of the partners; that they are conclusively presumed to intend the natural consequences of their own acts, and are not relieved therefrom by reason of there being no moral turpitude on their part; that the finding of the fact by the court that neither of the partners intended or designed to cheat, defraud, hinder or delay Schnull & Krag, or any other creditor, and that the transfer was not made for the purpose of securing an exemp-

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tion, only amounts to a finding that there was no moral turpitude on the part of the partners.

It is first important to determine whether the transfer made by the partners, Werbe and Domauget, severing the joint interest in the partnership property, and Werbe taking all the property and agreeing to pay all the debts, did operate as a fraud. By the terms of the sale of Domauget's interest in the firm property to Werbe, and Werbe agreeing to pay the firm debts, in the absence of fraud the property became the individual property of Werbe, and he was individually liable for the firm debts. The creditors might have availed themselves of the contract and sued Werbe individually, and if he had individual property, they could have subjected it to sale for the payment of their claims. They would have been placed on an equal footing with his individual creditors, and could not have been postponed from subjecting individual assets to payment of their debts until after the individual creditors were paid. In the absence of fraud they became his individual creditors; the property became his individual property. The firm creditors had no lien on the firm property. *Warren v. Farmer*, 100 Ind. 593.

It is asserted that there is no right of exemption out of firm property. That may be regarded as the settled law, and the weight of authorities is no doubt in support of this doctrine, though the case on which all the decisions in other later cases are based in this State is that of *Love v. Blair*, 72 Ind. 281, and the court in that case does not so hold. It is stated in the opinion that "The weight of authority is decidedly in favor of the proposition, that one partner can not claim any part of the property of an existing partnership as exempt from sale upon execution against him." It is further said: "There is, indeed, considerable conflict upon this question, and many courts declare the rule different from that stated. But, however it may be as to the rule just stated, it is very clear that one partner can not claim as exempt partnership property mortgaged by the

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partnership to secure a partnership debt." In the cases following, it is assumed that the question was decided in this case, when in fact it was not. Yet it is proper to regard it as settled in this State, that there is no right of exemption of firm property, but this only applies while it remains firm property. When the joint interest in the property is severed by the sale of one of the partners to the other of his interest in the firm property, then it is no longer firm property, and the debtor has the right to an exemption. Some courts hold that this severance may take place even after the levy of the writ; others hold that it must take place before the levy to entitle the debtor to an exemption of the property.

In Wisconsin it is held that the severance may take place after the levy, and each partner take his exemption. *Russell v. Lennon*, 39 Wis. 570; *Newton v. Howe*, 29 Wis. 531.

In the case of *O'Gorman v. Fink*, 57 Wis. 649, the court holds that consent of the partners that each shall select an exemption out of the partnership property after a levy thereon, constitutes and amounts to a severance of the joint property. The courts of Michigan, Georgia and other States hold the same as to the right of exemption in partnership property, and that the severance may take place after the levy of the writ. *Skinner v. Shannon*, 44 Mich. 86; *Blanchard v. Paschall*, 68 Ga. 32.

It is not by reason of any right that the firm creditors have as firm creditors that the partnership debtor can not claim an exemption of firm property, but it is by reason of the fact that the debtor does not own any separate part of it. The rights of the firm creditors are worked out through the partners.

In the case of *Warren v. Farmer*, *supra*, this court says: "Partnership creditors have no lien upon partnership property; their right to priority of payment out of the firm assets, over the individual creditors, is always worked out through the liens of the partners."

In *Pond v. Kimball*, 101 Mass. 105, the court says: "Prop-

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erty belonging to the firm can not be said to belong to either partner as his separate property. He has no exclusive interest in it. It belongs as much to his partner as it does to him, and can not in whole or in part be appropriated (so long as it remains undivided) to the benefit of his family."

In *Haas v. Shaw*, 91 Ind. 384, 396, this court says: "A partner can not claim partnership property as exempt from execution, for the reason that he has no individual interest in it."

In the case of *Smith v. Harris*, 76 Ind. 104, it is held that if the partnership interest in the property is secured by one partner purchasing the interest of the others before the issuing of the writ, the debtor may hold such property as exempt. The court in that case says: "The property in controversy had been seized by the appellee Harris, a constable, by virtue of an execution issued upon a joint judgment against the appellant and one Potts. The appellant claimed the property as his own, and as exempt from sale on execution, under the exemption law. The court instructed the jury, in effect, that the lien of the writ attached to the goods when it came to the constable's hands, and that, if at that time the property was partnership property, and was subsequently made the property of the plaintiff, by Potts releasing his interest to the plaintiff, this would not defeat the lien of the writ, and the appellant would not be entitled to claim it as exempt. This presents the main question which counsel have discussed; that is to say, whether partnership property, or an interest therein, can be claimed as exempt from execution by the individual members of the firm. The question has been already decided in the negative by this court. *Love v. Blair*, 72 Ind. 281. Whether the exemption could be claimed, depended on the ownership at the time the writ issued and became a lien, and so the issue was distinctly submitted to the jury. There was no error in the instruction in this respect."

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The courts universally hold that exemption laws should be liberally construed.

In the case of *Blair v. Smith*, 114 Ind. 114, this court holds that there can be no fraudulent conveyance of property not subject to execution. The court says: "If the property is not subject to execution, the debtor has an absolute right of disposition, with which creditors can not interfere."

If the partners had the right to sever their interests in the partnership property at any time before the writ of execution issued and became a lien on the property, notwithstanding the insolvency of the firm, and thus hold an exemption out of the property, then there was no fraud in the transaction in this case, and the finding of the court and the conclusions of law were correct.

It is contended by counsel for appellant that, the firm being insolvent, the members of the firm, or at least Werbe, must have known the condition of the firm as to ability to pay its debts, and therefore the severance of the joint interest, entitling Werbe to an exemption, was in itself a fraud, although done in good faith. Applying this theory to its legitimate extent, if sound, where does it lead us? Any disposition of property by an insolvent debtor after he knew himself to be insolvent, although done in the best of faith, which operated to the detriment of any of his creditors, would operate as a fraud. The same rule that would make the transfer of firm property fraudulent would make the transfer of individual property fraudulent, and if an insolvent debtor's property, during any time of the existence of the debt, was subject to execution, he could do no act by which he could or would be entitled to exemption. If an insolvent debtor owned property of a kind or character which was not exempt, he could not exchange it for property which would be exempt, and if he did so it would operate as a fraud on his creditors, and he could not hold such property as exempt. But a step further on the same line of reasoning:

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If an unmarried man, who was not entitled to exemption, owned property, but was owing debts so that he was in fact insolvent, and he married before judgment was rendered, he could not claim an exemption, for it could be said with the same force that counsel say, "that when a partnership is insolvent and known to be so, the partners become, as it were, trustees for the creditors to wind up the firm affairs," that when a person becomes insolvent and knows himself to be so, he, too, acts as trustee for his creditors, and any act which deprives them of any portion of his estate, although done in good faith, would operate as a fraud upon his creditors and he could not take the benefit of it.

The principle applied in the case cited, *Coons v. Tome*, 9 Fed. Rep. 532, where the directors of an insolvent corporation confessed judgment in favor of one of their number with a view of giving him a priority of lien, and it was held that they could not give him a priority over other creditors, does not apply to prevent parties from deriving the benefit of the exemption law. The exemption law is a humane provision for the benefit of the families of debtors, that debtors may not have the last farthing taken from them, and their wives and dependent children left without sustenance. We are unable to see why they should not have the right of exemption against partnership creditors and out of partnership property, except for the reason given, that the partnership debtor owns no separate part of the partnership property.

Wait on *Fraudulent Conveyances*, at section 47, says: "It being the general rule that exempt property is not ordinarily susceptible of fraudulent alienation as regards creditors, it has been decided that there is no intelligible ground upon which it can be held to be fraudulent as against them, for a person whose property does not in the aggregate exceed the value of all the exemptions, but a portion of which property in its present state is not exempt, to convert or exchange it into the particular kinds of property which are exempt. Thus, in *O'Donnell v. Segar*, 25 Mich. 367, the

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court said: 'The only fraud claimed to have existed in reference to the oxen, was that he might fraudulently have acquired them from the proceeds or exchange of other property which was not exempt, and this, with the intent to defeat the claims of creditors. This, in my opinion, if true, does not constitute legal fraud, so long as he was, in fact, engaged in one of the occupations mentioned, * * in which the use of the cattle was needed.' In *Randall v. Buffington*, 10 Cal. 491, the court decided that a general creditor of an insolvent debtor could not subject a homestead to liability for his debts, notwithstanding that the insolvent had applied property in his hands to the payment of a debt which was a lien on the homestead. 'It must be remembered,' said Chief Justice BREESE, 'that it is not a fraud on creditors to buy a homestead which would be beyond their reach.' This would seem to afford a debtor an opportunity to practice a species of petty fraud upon his creditors, but, as exemptions of property from execution are usually very limited in amount, and the policy of the law is to prevent the creditor from absolutely stripping the debtor of every vestige of property and of all the necessary conveniences of living, or means of gaining a subsistence, the result is not to be deprecated. The creditors should not be favored to the extent of absolutely crippling and pauperizing the debtor."

In the case of *O'Donnell v. Segar*, 25 Mich. 367, the court says: "I am at a loss to perceive how the plaintiff could have been deprived of the statute exemption by clear proof that he had purposely disposed of all the property he had which was subject to execution, for the purpose of investing the proceeds in, or converting them into, that kind of property which was exempt under the statute." And the court, in the same opinion, further says: "When the statute exempts from execution certain kinds of property to certain amounts, without any exception or qualification on the ground here urged, I can see no intelligible ground on which it can be held fraudulent for any man whose property does not, in the ag-

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gregate, exceed the aggregate value of all the exemptions, but part of which, in its present shape, is not exempt, to convert or exchange it into those particular kinds of property which are exempt."

There are numerous cases supporting the doctrine laid down by Wait. See *Randall v. Buffington*, 10 Cal. 491; *Hixon v. George*, 18 Kans. 253; *Cipperly v. Rhodes*, 53 Ill. 346.

The law gives to the debtor in this State \$600 as exempt from execution. If he has property of that value he can claim it as exempt from execution. He may have borrowed the money to pay for every dollar of the property, and yet when he is sued he claims the property as exempt. It very often seems to the creditor a hardship, yet it is a right given to the debtor by statute, and is a wise and humane provision. Many States make still more liberal provisions for the unfortunate debtor. If this right is given against the individual creditor, and if the individual debtor may convert certain property not exempt into property which is exempt, and such act not constitute a fraud, why should not the partnership debtor have the right to sever the joint interest in the property and hold his exemption out of such property?

The exemption law is made for the insolvent debtor; it is he that it is intended to protect. The solvent debtor needs no protection by the way of an exemption. It is only where a debtor becomes insolvent that he is protected by the exemption.

In the case of *Fisher v. Syfers*, 109 Ind. 514, this court says: "Partners, the same as others, may, by sale or mortgage of the partnership property, give a preference to their creditors. If a sale or mortgage is made in good faith, to secure a *bona fide* debt or debts, the transaction can not be successfully assailed, on the ground that the creditors preferred are the individual creditors of the several partners."

The true doctrine is, that the property of the partners is their joint property, and they may sell and dispose of the

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same in good faith as they deem proper, and as held in the case of *Fisher v. Syfers, supra*, they have the right to prefer creditors, and even may, if all the partners consent to do so, dispose of the property to satisfy the individual debt of one of the partners, which would operate to decrease the assets of the firm and to the detriment of the firm creditors, yet, nevertheless, they have such right to secure or pay the *bona fide* debt of one of the partners. We submit there is no difference in principle between this and the act complained of in this case, even if done with the intent and purpose of giving Werbe the benefit of an exemption out of the property. It was simply, by agreement, severing the joint interest in the partnership property to allow Werbe to take the benefit of such severance, to secure to him the benefit of an exemption given to him by law. Neither is it different in principle from allowing a debtor to exchange or convert property not exempt for such as is exempt, which doctrine, we think, is sustained by the weight of authority, and in harmony with the just principles of law and equity in construing the exemption laws.

It is supported by the authorities, and we hold that partners have the right to, in good faith, sever their joint interest in partnership property by contract of sale from one partner to another, or by a division of the partnership property between the partners, at any time before the firm creditors obtain a lien upon such firm property; that when the joint interest is severed the individual partners have the right to an exemption out of the property; that the fact that such firm is insolvent at the time of the severance, and that the severance is made with the knowledge on the part of the partners that it gives to them the right of exemption out of the property, does not constitute conclusive presumption of fraud upon the firm creditors which will deprive the individual partners of the right to have an exemption of such property. With this version of the law, it follows that the finding of

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facts was supported by the evidence, and that the conclusions of law as stated by the court below are correct.

It is insisted by counsel for appellant that the court erred in permitting certain questions to be put by counsel for appellee to Mrs. Domauguet, which it is claimed are leading.

The permission of leading questions is much in the discretion of the trial court, and unless it appears that such discretion was abused, this court will not reverse a case on that account. It does not appear but that such discretion was properly exercised by the trial court in this cause.

There is no error in the record for which the judgment ought to be reversed.

Judgment affirmed, with costs.

Filed Jan. 30, 1889.

No. 13,288.

SMITH ET AL. v. THE STATE, EX REL. INGERMAN.

DRAINAGE.—*Action on Commissioner's Bond.*—*Repeal of Statute.*—*Saving Clause.*—The saving clause in the repealing act of 1885 applies to an action on the bond of a drainage commissioner appointed under the act of 1881, for a breach of duty in the construction of a drain under the latter act, where it does not appear that prior to the commencement of the action the proceedings for the establishment of the drain had terminated. But without the saving clause, an action would lie for waste or conversion of the funds by the commissioner.

SAME.—*Deviation from Survey and Specifications.*—*Liability.*—A drainage commissioner has no right, of his own motion, to deviate from the plans and specifications according to which the work is ordered by the court to be constructed, and if he does so, he is liable on his bond for any damages that may result.

SAME.—*Measure of Damages.*—In an action brought on the bond of a com-

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missioner for a failure on his part to construct a drain as ordered by the court, the measure of damages is the amount necessary to complete the work in the manner ordered.

SAME.—*Paying for Defective Work.*—*Negligence.*—If a drainage commissioner negligently pays out the money in his hands to insolvent contractors for defective work, without first requiring them to remedy the defects and construct the drain as ordered by the court, he is liable.

SAME.—*Ditchers.*—*General Reputation for Skill.*—*Evidence.*—In such case, evidence of the general reputation of the persons employed to dig the drain in controversy, for skill and diligence in the business of constructing drains, would not tend to prove that the particular drain was properly constructed, or any other material fact, and its exclusion is not error.

NEW TRIAL.—*Excessive Damages.*—*Practice.*—An assignment as a cause for a new trial that the damages are excessive, applies only to actions for tort, and is not applicable to actions on contract.

INSTRUCTIONS TO JURY.—*Modification.*—The trial court, before giving an instruction asked by a party, may modify it so as to make it apply properly to the evidence.

From the Hamilton Circuit Court.

T. J. Kane and T. P. Davis, for appellants.

R. R. Stephenson and W. R. Fertig, for appellee.

COFFEY, J.—This was a suit in the Hamilton Circuit Court by the appellee against the appellants upon the following bond:

“We, Samuel B. Wells, J. L. Benson, S. M. Smith, A. F. Brown and F. A. Hawkins, are held and firmly bound unto the State of Indiana in the penal sum of five thousand dollars, to be levied of our good and chattels, lands and tenements, if default be made of the following conditions, to wit:

“Whereas, by an act of the Legislature of the State of Indiana, entitled ‘An act concerning drainage,’ approved April 8th, 1881, it is provided that the circuit court of each county shall appoint two persons commissioners of drainage, and whereas the above named Samuel B. Wells has been appointed one of the commissioners for the county of Hamilton, State of Indiana; now, if the above bound Samuel B. Wells shall faithfully discharge his duties as such commissioner, and shall give an account according to law for all moneys

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that shall come to his hands as such commissioner, then the above obligation shall be void, else to be and remain in full force and virtue in law."

It appears by the record in this cause that certain of the citizens of Hamilton county petitioned for the construction of a drain, and that such proceedings were had thereon as resulted in an order by the circuit court of that county directing that said drain be constructed according to the survey, plans and specifications set forth in the report of the commissioners of drainage then on file in said court.

The defendant Wells, who was one of said commissioners, was appointed by the court to collect the assessments necessary to defray the expenses and to superintend the work. He entered upon the discharge of his duty, collected the assessments, amounting to \$1,500, and continued in office until ———, 1886, when he resigned, and the relator herein, who was the other drainage commissioner of the county, was appointed by the court as his successor in said work, and was ordered to proceed with the same to completion, and was also authorized by the court to bring this action.

It is alleged in the complaint, as breaches of the bond above set forth, that the defendant Wells wholly failed to have said drain constructed according to the survey and orders of the court, but caused and suffered said work to be done carelessly, unskilfully and imperfectly; that the same is wholly useless—that is to say, he let the contract for cutting said drain, laying the tile and filling the ditch to incompetent, unskilful and irresponsible persons, then and still wholly insolvent, knowing them to be such, and that he wholly failed to take any security or bond whatever for the faithful performance of said work, and carelessly suffered said contractors to cut said drain and lay said tiling, and cover the same deeply with earth, without first having the said drain cut according to said survey, and without giving the ditch a uniform fall, so as to allow the water to flow freely through said tiling; that the same was cut out to irregular depths, varying

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from the proper level in different places along the route of said drain, where the greatest depth was required, more than one foot, and lacking one foot of the depth of six feet at the head of said ditch as required by said survey and order; that the water does not flow freely through said tiling, and will not flow at all only as it is forced through by head-water; that said drain does not carry off the water to a sufficient depth below the surface of the ground in the swamp it was intended to drain to fit the same for cultivation, or to furnish an outlet for side drains; that said ditch is wholly useless for the purposes for which it was intended, but had it been constructed according to said survey it would have furnished sufficient outlet for the drainage of said swamp, reclaimed the same and rendered the soil thereof productive and of great value; that said Wells wrongfully and negligently paid over to said contractors large sums of money, to wit, one thousand dollars and the entire price for the work done by them, negligently having failed to exercise any supervision over the same, or to make any inspection thereof; and negligently failed to remedy said defects, or to require said contractors so to do, when by the exercise of reasonable care, and by proper inspection as the work progressed, and at the time said contractors professed to have completed the same, he might have discovered and remedied said defects; that had he exercised proper care, and made said inspection before said drain was filled with earth, the said defects could have been discovered, and, at a nominal cost, remedied, but that in its present condition said drain will have to be re-opened, the tiling removed and the bottom of said channel cut to its proper level, according to said survey and order, to make the same effective to drain said land, which will cost one thousand dollars; that said Wells paid out all the remainder of said assessments, except the sum of \$100, which he converted to his own use, and then absconded, leaving no funds to complete said work.

The defendant Wells made default in the court below, and

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the other defendants appeared and filed a demurrer to the complaint, alleging as cause :

1st. That the complaint did not state facts sufficient to constitute a cause of action against them.

2d. That said plaintiff had no legal capacity to sue.

3d. That there was a defect of parties plaintiffs, in this, that the parties affected by the alleged failure of duty on the part of the drainage commissioner should have been joined as plaintiffs.

4th. That the court had no jurisdiction of the subject-matter of this action.

The court overruled the demurrer, and the defendants excepted.

The defendants then answered the complaint by a general denial. The cause was submitted to a jury for trial, who returned a verdict for the plaintiff, assessing the damages at six hundred and ninety-four dollars.

The defendants filed a motion for a new trial, which was overruled by the court, to which they excepted, and the plaintiff had judgment on the verdict.

The appellants assign as error in this court :

1st. That the complaint does not state facts sufficient to constitute a cause of action.

2d. That the court erred in overruling the demurrer of the appellants Smith, Benson and Brown to the complaint.

3d. That the court erred in overruling the motion of the appellants for a new trial.

Under the first cause of demurrer only one objection is urged to the complaint as a cause of action, and that is, that no copy of the bond in suit is filed with or made part of the complaint. Since the filing of the brief of appellants urging this objection, a copy of the bond has been inserted in the record at the proper place, by agreement of counsel, it having been inadvertently omitted by the clerk in making the transcript. This obviates the objection urged in the brief of appellants on account of this defect.

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It is contended by counsel that inasmuch as the act of 1881, under which the drain in controversy was ordered, was repealed by the act of 1885, this plaintiff has no right of action.

Section 13 of the act approved April 6, 1885, Acts of 1885, page 129, repeals the act approved April 8, 1881, and all acts amendatory thereof, but with this proviso: "*Provided, however, That where application has been made or proceedings are pending, or works for the purpose of drainage are in course of construction under said acts, the same may be carried on and completed, and assessments therefor collected according to the provisions of said acts, and shall not be affected by this act.*"

It is claimed that it appears by the appellee's complaint that the work of constructing the drain in dispute was completed before the commencement of this suit, and that, therefore, this proviso does not apply to this case.

Under section 4277, R. S. 1881, it was the duty of the drainage commissioner to see that the drain was constructed as ordered.

By the provisions of section 4279 he was required to keep an accurate account of his receipts and expenditures and to take vouchers for all moneys paid out; he was required to make a full report to the court ordering the work, as often as once in every six months; he was at all times under the control and direction of the court, and was required to obey its instructions. This section also provides for suit on his bond for any breach of the same. While there is no express provision that the court shall determine when the work is completed, yet that it is required to perform this duty is fairly to be inferred. In practice, the cause remains on the court's docket until the final report of the commissioner is made and approved, and it is not to be presumed that the court would approve the final report of the commissioner and strike the case from the docket until satisfied that the work had been completed according to its order. It does not appear that

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any such action was taken in the matter of this drain, while on the other hand it does appear that the recovery sought in this cause is for the purpose of raising funds with which to complete the drain.

We do not think, therefore, that it appears from the complaint that the proceedings to construct the drain in controversy had terminated before the commencement of this suit, but we do think that the fair inference is that they were still pending. Such being our conclusion, it follows that the proviso above set out applies to the case.

Furthermore, we do not think that the right of action set up in the complaint would be destroyed by the repeal of the act of 1881 even in the absence of any saving clause. If the drainage commissioner had converted all the funds that came into his hands to his own use, we do not think he could successfully defend a suit on his bond by those interested, under a plea that the act by virtue of which he received them had been repealed. The same rule would apply where he had wasted the fund.

The motion for a new trial embraces twenty-four reasons why, in the opinion of the appellants, a new trial should have been granted. We are not urged to reverse the judgment on account of the third, fourth and fifth reasons assigned. The first reason assigned is: "That the verdict of the jury is excessive." Second. "That the damages assessed by the jury are excessive."

Under section 559, R. S. 1881, this is the fourth reason for a new trial and is not applicable in an action on contract, like this. It applies to torts only. To raise the question here sought to be raised the assignment should have been made under the fifth statutory cause and not under the fourth. *Dix v. Akers*, 30 Ind. 431; *Lake Erie, etc., R. W. Co. v. Acres*, 108 Ind. 548; *Thomas v. Merry*, 113 Ind. 83; *Clark Civil Tp. v. Brookshire*, 114 Ind. 437; *McCormick Harvesting Machine Co. v. Gray*, 114 Ind. 340.

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The later cases here cited must be regarded as overruling the case of *Hill v. Newman*, 47 Ind. 187, upon this point.

The seventh reason assigned for a new trial brings in question the ruling of the court below in refusing to give to the jury instructions numbered two, four, six, seven and eight.

The cause was tried by the court below upon the theory that it was the duty of the defendant Wells, as the drainage commissioner in charge of the work, to use reasonable diligence to see that the work was done according to the survey and specifications and in accordance with the order of the court. In passing upon the report of the drainage commissioners, and in ordering the work done according to the plans and specifications therein contained, the question of that being the best and cheapest mode of constructing the drain became and was adjudicated. The drainage commissioner had no right to deviate from these specifications without first procuring from the proper authority a change of the same, and if he did so deviate, and any damages resulted therefrom, he was liable on his bond for such damages.

We think the proper measure of damages in such case would be the amount required to complete the work in the manner it had been ordered by the court. Those who pay the assessments have the right to insist upon the construction of the work as it has been established by the report of the commissioners, and by the judgment of the court. Under this theory the instructions of the court below fully covered the case.

The second and fourth instructions asked by the appellants are drafted upon the theory that the drainage commissioner had the right to deviate from the survey, specifications and order of the court, and adopt a plan of his own, provided the plan he adopted was as good as the one already adopted and adjudicated. We do not think he had such right. Furthermore, these instructions were too indefinite and were calculated to mislead the jury.

The fifth instruction asked by the appellants is as follows:

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“ If you believe from the evidence that said work was defective and imperfect when completed, but that such defects and imperfections could not have been avoided by the exercise of reasonable care and prudence on the part of the commissioner of drainage in the proper discharge of his duties, your verdict should be for the defendants.”

This instruction is defective in ignoring the issue made by the parties that the defendant Wells carelessly and negligently paid out the money in his hands to insolvent contractors, before the work was done according to the plans, specifications and order of the court.

If the work was defective, he should not have paid out the money until the defects were remedied, though the imperfections could not have been avoided by the exercise of reasonable care on the part of the commissioner of drainage.

Such imperfections and defects, it may be, could have been avoided by the workmen, and if so, they should not have been paid until they had remedied such imperfections and defects.

We have been unable to find any evidence in the record to which the sixth instruction asked by the appellants was applicable ; and all that is material to the case in the seventh is embraced in the tenth instruction given by the court.

We also think that the modification made by the court of the eight instruction asked was proper, in order to make it apply properly to the evidence in the cause. It seems to be an undisputed fact in this case that the drain at some points was not as deep as the survey required it to be, and in that respect was not completed. The chief modification consisted in including in the instruction the unfinished work, as well as the imperfect construction of that which had been completed. In this the court did not err.

The remaining questions in the case relate to the admission and exclusion of evidence. We have examined the evidence carefully and do not think any improper evidence was admitted by the court below.

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The appellants offered to prove, on the trial, by a competent witness, the general reputation of the persons employed to dig the drain in controversy, for skill and diligence in the business of constructing drains. This evidence would not have tended, if admitted, to prove that the drain now under consideration was properly constructed, nor would it tend to prove any other material fact in the case. We do not think the court erred in excluding it.

After a careful examination of all the questions raised by the record; we have been unable to find any error for which the judgment of the court below should be reversed.

Judgment affirmed.

Filed Jan. 29, 1889.

No. 12,171.

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FIXTURES.—*Nature of Articles.*—*Manner of Annexation.*—*Intention of Party Making the Annexation.*—*Policy of the Law.*—The nature of the articles, and the manner in which they are affixed, and the intention of the party making the annexation, together with the policy of the law, are controlling factors in determining whether an article, which may or may not be a fixture, becomes part of the realty by being annexed to the freehold.

SAME.—*Machinery.*—*Intention of Purchaser.*—*Chattel Mortgage.*—*Rights of Innocent Purchasers.*—When a person purchases machinery with a view that it shall be annexed to or placed in a building of which he is the owner, and executes a chattel mortgage on the property so purchased, he thereby evinces his intention that the property shall retain its character as personalty, regardless of the manner in which it may be annexed to the freehold, and it will be so regarded where the rights of innocent purchasers are not involved.

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SAME.—*Chattel Mortgage.—Provision Upon Default of Payment.—Effect of.*—

A provision in a chattel mortgage, that, upon default of payment of the mortgage debt, the mortgagee may take possession of the mortgaged chattels and sell the same, is, if anything beyond the mortgage itself was needed, equivalent to an express agreement that the property shall continue to be regarded as personalty.

SAME.—*Prior Real Estate Mortgage.—Right of Removal as Against.*—A chattel mortgage is effectual to preserve the character of the mortgaged chattels as against a mortgage on the realty executed prior thereto, if the chattels can be removed without injuring or impairing the value of the real estate or the buildings thereon. If the detachment would occasion some diminution in the value of the realty, as it would have stood had the attachment not been made, then the depreciation must be made whole, and the rights of the parties adjusted according to the equity of the case.

SAME.—*Subsequent Real Estate Mortgage.—When Subject to Prior Chattel Mortgage.*—Where, by the language of a subsequent mortgage on real estate, chattels theretofore affixed to the realty are recognized and treated as personal property, such mortgage will be subject to a prior chattel mortgage on the same.

PRACTICE.—*Transcript.—Copies of Instruments.*—When a paper is once copied into the transcript, it is not necessary to copy it again when introduced into subsequent parts of the record, provided it be so referred to that it can be identified with certainty.

From the Marion Superior Court.

V. Carter, for appellant.

A. B. Cole, A. C. Harris and W. H. Calkins, for appellees.

MITCHELL, J.—On the 3d day of March, 1883, John M. Kemper, then a resident of Marion county, purchased of Eckart Bros. a tract of land, embracing two acres, in Du-bois county, for the consideration of one thousand dollars, upon which to locate a heading factory. He executed to the vendors two notes for five hundred dollars each, in consideration of the purchase-price, and secured them by a mortgage, bearing date March 7th, upon the real estate purchased. The mortgage was duly recorded. Before purchasing the land, Kemper had given an order to Hadley, Wright & Co., manufacturers, of the city of Indianapolis, for an engine and

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boiler, and for saws, shafting, pulleys, and other machinery, to be used in the factory. At the time the order was given Kemper told the manufacturers that he had found ground which he could lease upon which to place the mill he contemplated erecting in which to use the machinery. On the 5th day of March, 1883, while the machinery was yet in the possession of Hadley, Wright & Co., they having agreed to deliver it to Kemper on board the cars at Indianapolis, the latter executed to the former a chattel mortgage in the usual form to secure the purchase-price of the machinery, which aggregated one thousand seven hundred dollars. It was orally agreed by Kemper that the machinery should be treated as personal property until the notes were paid, and the mortgage contained a stipulation authorizing the mortgagees, in case of default, to take possession of the mortgaged chattels wherever found, etc. This mortgage was duly recorded in Marion county where Kemper resided. The latter erected a building upon the land conveyed to him by the Eckarts, the main part of which was fifty-two by twenty-eight feet, with an engine room adjoining twenty-four by twenty-four feet. The building consists of a light frame, boarded up and down, with a shingle roof, and rests upon posts or blocks, which rest on or set in the ground. It is estimated to be worth two or three hundred dollars. The forty-horse power stationary engine, and the boiler, which was four by twenty feet, weighing four thousand pounds, were placed in or upon brick foundations in the usual manner, and were bolted into the masonry in which they were imbedded. The saws were fastened on foundations imbedded in the soil, there being an earth floor. The shafting and pulleys were secured to the building in the customary manner, and so, also, was the iron chimney or smoke-stack held in place. Other customary conveniences and appointments for conducting the business were provided. It appeared in evidence that the machinery could be removed without material injury to the building, except the masonry which supported the engine and boiler,

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and without material detriment to the machinery, and that the value of the real estate would not be appreciably diminished otherwise than by the absence of the machinery.

After the building had been completed and the factory put in operation, Kemper executed a second mortgage on the real estate to John L. Forkner and others, to secure a debt due the Dubois County Bank. In this last mortgage the real estate is properly described by metes and bounds, and after the description of the same we find the following: "And said mortgagor also mortgages and warrants all machinery and appurtenances, including steam boiler, engine, saws, trucks and all tools in and about and necessary to carry on the heading factory situate on said real estate, and that none of said machinery or tools are to be removed until this mortgage is paid and satisfied."

The controversy here is between the appellant, Binkley, the assignee of the notes secured by the chattel mortgage to Hadley, Wright & Co., and the Eckarts and the Dubois County Bank, who were made parties defendants by Binkley, to a suit brought in the superior court of Marion county to foreclose the chattel mortgage.

On the one hand the insistence is, that, notwithstanding the annexation of the machinery to the real estate as already described, it retained the character of personalty in consequence of the prior chattel mortgage, and the contemporaneous agreement that it should be treated as personal property until the notes given for the purchase-price to Hadley, Wright & Co. had been paid.

Admitting that Hadley, Wright & Co. held a valid chattel mortgage upon the machinery prior to its annexation to the realty, the result to which the argument leads, on the other hand, is, that, because the machinery was annexed to the freehold by the owner, and was peculiarly adapted to be used in connection with the building in which it was placed, the law will raise a conclusive presumption that the owner intended it as a permanent accession to the land. Hence the

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conclusion insisted upon is, the character of the machinery as personal property came to an end when it was annexed to the land, and that of realty became inevitably fixed upon it.

The question thus presented has been the subject of much discussion, and the result deducible from the reported cases is not in every respect harmonious, or of so definite and precise a character as could be desired. Very much depends upon the relation which the persons between whom the question arises sustain toward each other, whether it be that of personal representative and heir of a deceased person, landlord and tenant, vendor and vendee, mortgagor and mortgagee or some other, which may give a peculiar character to the case. While some rules of general application have been formulated, in the very nature of the subject each case must in some degree be controlled by the varying circumstances peculiar to it.

The united application of three requisites is regarded as the true criterion of an immovable fixture: (1) Real or constructive annexation of the article in question to the freehold. (2) Appropriation or adaptation to the use or purpose of that part of the realty with which it is connected. (3) The intention of the party making the annexation to make the article a permanent accession to the freehold. *Teaff v. Hewitt*, 1 Ohio St. 511, 530; *Potter v. Cromwell*, 40 N. Y. 287; *Ewell Fixtures*, 21; *Tyler Fixtures*, 114; *McRea v. Central Nat'l Bank*, 66 N. Y. 489.

According to the elementary rule of the common law, whatever is annexed to the freehold becomes, in legal contemplation, a part of it, and is thereafter subject to the same incidents and conditions as the soil itself. But the diversity of trade and the development of manufactures required that the strict rules of the common law be measurably relaxed, and it may now be said that the nature of the articles and the manner in which they are affixed, and the intention of the party making the annexation, together with the policy of the law, are controlling factors in determining whether an

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article, which may or may not be a fixture, becomes part of the realty by being annexed to the freehold. The purpose or intention of the parties, the effect and mode of annexation, and the public policy in relation thereto, are all to be considered.

When the parties immediately concerned, by an agreement between themselves, manifest their purpose that the property, although it is to be annexed to the soil, shall retain its character as personalty, then, except as against persons who occupy the relation of innocent purchasers without notice, the intention of the parties will prevail, unless the property be of such a nature that it necessarily becomes incorporated into, and a part of, the realty by the act and manner of annexation. *Taylor v. Watkins*, 62 Ind. 511 ; *Yater v. Mullen*, 24 Ind. 277.

Thus, if, in the course of constructing a house, brick should be placed in the walls, and joists and beams in their proper places, the brickmaker and sawyer would not be permitted to despoil the house by asserting an agreement with the owner that the brick and beams were to retain their character as personalty notwithstanding their annexation. In such a case the mental attitude of the parties can not modify the legal effect resulting from the annexation. *Campbell v. Roddy* (N. J.), 14 Atl. Rep. 279 ; *Henkle v. Dillon*, 17 Pac. Rep. 148 ; *Jones Chat. Mortg.*, section 125.

But when chattels are of such a character as to retain their identity and distinctive characteristics after annexation, and do not thereby become an essential part of the building, so that the removal of the chattels will not materially injure the building, nor destroy or unnecessarily impair the value of the chattels, a mutual agreement in respect to the manner in which the chattels shall be regarded after annexation will have the effect to preserve the personal character of the property between the parties to the agreement. *Rogers v. Cox*, 96 Ind. 157 ; *Price v. Malott*, 85 Ind. 266 ; *Hendy v. Dinkerkhoff*, 57 Cal. 3 ; *Haven v. Emery*, 33 N. H. 66 ; *Ewell Fixtures*, 66 ; *Malott v. Price*, 109 Ind. 22.

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Accordingly, the proposition is well sustained that one who purchases machinery with a view that it shall be annexed to, or placed in, a building of which he is the owner, and who executes a chattel mortgage on the property so purchased, thereby evinces his intention that the property shall retain its character as personalty, regardless of the manner in which it may be annexed to the freehold. *Eaves v. Estes*, 10 Kan. 314; *Ford v. Cobb*, 20 N. Y. 344; *Sisson v. Hibbard*, 75 N. Y. 542; *Tift v. Horton*, 53 N. Y. 377; *Campbell v. Roddy*, *supra*; *Henkle v. Dillon*, *supra*.

Except where the rights of innocent purchasers are involved, it is the policy of the law to uphold such contracts in the interest of trade.

The execution of a chattel mortgage by the owner of land, upon machinery which he afterwards places in a building thereon, is regarded as an unequivocal declaration of his intention that the act of annexation shall not change or take away the character of the machinery as personalty, until the debt secured by the mortgage has been fully paid. *Tift v. Horton*, *supra*.

A provision in a chattel mortgage that, upon default of payment of the mortgage debt, the mortgagee may take possession of the mortgaged chattels and sell the same, if anything beyond the mortgage itself was needed, is equivalent to an express agreement that the property shall continue to be regarded as personalty.

Having reached the conclusion that, when the nature of the property admits of it, parties may by convention fix its character as personalty as between themselves, after it is annexed to the freehold, and that a chattel mortgage, such as the one under consideration, is equivalent to an express agreement in that respect, the case would be of easy solution but for the intervention of the rights of others than the immediate parties to the chattel mortgage.

It remains to be considered whether the chattel mortgage from Kemper to Hadley, Wright & Co. was effectual to pre-

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serve the character of the mortgaged chattels as against the purchase-money mortgage given by Kemper to Eckart Bros., and the subsequent mortgage to the bank. What are the rights of a mortgagee of chattels of the description of those in question, who consents that the mortgaged property may be taken out of the county in which his mortgage is recorded, and that it may be annexed to real estate in such a manner as that, in the absence of an agreement or intention to the contrary, the act of annexation, *ipso facto*, makes the property accessory to the freehold?

In some jurisdictions, as will appear from the authorities already cited, the rule seems to be that an agreement between the owner of land and the vendor of chattels, which are to be annexed thereto, concerning the character of the chattels, is valid, not only between the parties, and against a prior mortgagee of the land, but also against a subsequent mortgagee or purchaser without notice, while in others an essentially different effect is attributed to such an agreement. Thus, in *Tift v. Horton*, *supra*, and *Ford v. Cobb*, *supra*, it was held by the Court of Appeals, in the State of New York, that neither a precedent nor subsequent mortgagee of real estate could defeat the claim of one holding a chattel mortgage upon property which had been annexed to the mortgaged premises under an agreement that it should continue to be regarded as personalty.

These cases hold that the agreement between the holder of the chattel mortgage and the owner of the land, that the chattels shall retain their character as personalty, rebuts the presumption that they were intended as permanent accessories to the land, and binds both prior and subsequent mortgagees.

In *Pierce v. George*, 108 Mass. 78, a chattel mortgage was taken upon certain machinery in contemplation that the machinery was to be fastened to a building and annexed to real property owned by the mortgagee, and it was held that a subsequent mortgagee of the real estate could hold the chat-

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tels as a part of the land. So it was held by the same court, in *Hunt v. Bay State Iron Co.*, 97 Mass. 279, that an agreement between the owner of iron rails and a railroad company, that the rails should retain their character as chattels after they had been fastened to the road-bed, would be unavailing as against a previous mortgagee of the road or a purchaser without notice. See, also, *Stillman v. Flenniken*, 58 Iowa, 450.

There is, therefore, no general rule which declares that machinery, upon which there is a chattel mortgage, becomes necessarily subject to an existing mortgage upon real estate to which it may afterwards be annexed with the consent of the mortgagee, to the exclusion or postponement of the prior chattel mortgage.

A prior mortgagee can not occupy the attitude of an innocent purchaser. The interests and rights of the holder of a chattel mortgage upon property which is annexed to real estate upon which there is an existing mortgage, must be determined by the practical application of equitable principles to the rights of the respective parties.

Whether the chattel mortgage shall be postponed, notwithstanding the agreement between the owner of the land and the mortgagee, must depend upon the inquiry whether or not the preservation of the rights of the holder of the chattel mortgage will impair or diminish the security of the real estate mortgage as it was when he took it. If it will not, then it would be inequitable that the latter should defeat or destroy the security of the former. If it will, then it was the folly or misfortune of the holder of the chattel mortgage that he permitted the property to be annexed to a freehold from which it can not be removed without diminishing or impairing an existing mortgage thereon. As was said by the Court of Errors and Appeals of New Jersey, in *Campbell v. Roddy*, *supra*, "Where the articles are of such a character that their detachment would involve a destruction of or a dismantling of an important feature of the realty, such an-

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nexation might well be regarded as an abandonment of the lien by him who impliedly assented to the annexation."

Unless the detachment of mortgaged chattels would materially affect the security of the real estate mortgagee, by depreciating the value of the mortgaged property, or by dismantling it of an important feature existing at the time the mortgage was taken, the precedent real estate mortgage only attaches to the actual interest which the mortgagor has in the personal chattels subsequently annexed at the time of their annexation. *Campbell v. Roddy*, *supra*; *United States v. New Orleans Railroad*, 12 Wall. 362; *Fosdick v. Schall*, 99 U. S. 235.

Or if, as in *Bass Foundry, etc., v. Gallentine*, 99 Ind. 525, the introduction of the new machinery involved the dismantling of a mill upon which a prior mortgage existed, so as to impair the security thus afforded, a claim upon the machinery so introduced would not prevail over the prior real estate mortgage.

In the present case it appears that the removal of the engine and boiler and other machinery would not injure or impair the value of the real estate or the building thereon. There can be no reason, therefore, so far as the Eckart Brothers are concerned, why a court of equity should practically destroy the security of the appellant, so long as the preservation of his rights are not prejudicial to those of the Eckart Brothers. As is in effect said in the well considered case already quoted from, if the detachment of the articles so annexed would occasion no damage to the realty, then the lien upon them can be enforced by a court of equity in the same degree as if they had remained chattels according to the agreement. If the detachment would occasion some diminution in the value, as it would have stood had the attachment not been made, then the depreciation must be made whole, and the rights of the parties adjusted by the chancellor according to the equity of the case.

The distinction between chattels whose completeness and

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identity as separate and distinct articles may be preserved, notwithstanding their annexation, and those which necessarily become absorbed or merged in the realty by being annexed, must be kept in view. *Porter v. Pittsburgh Steel Co.*, 122 U. S. 267 (283); *Dunham v. Railway Co.*, 1 Wall. 254; *Galveston Railroad v. Cowdrey*, 11 Wall. 459.

This disposes of the case so far as it relates to the precedent mortgagees. As to the holder of a chattel mortgage who consents to have the mortgaged chattels placed in such an attitude in relation to real estate as that subsequent innocent purchasers and mortgagees are liable to be misled by the owner of the land to which they are annexed, there seems to be no equitable ground upon which his title should be enforced as against such purchasers or mortgagees.

The peculiar character of the subsequent mortgage executed to the bank in the present case, renders it unnecessary, however, that we should enlarge upon this feature of the subject. Recurring to the statement of the case, it will be seen that, after describing the real estate upon which the factory and machinery were situate, the engine, boiler, and other machinery are particularly and specifically enumerated as being also and in effect separately mortgaged. Coupled with this was the further stipulation that the mortgagor should not remove any of the machinery enumerated from the land on which it was then situate, until the mortgage debt was fully paid.

This feature of the mortgage was entirely unnecessary and meaningless, except upon the theory that the parties recognized and treated the engine and boiler and other enumerated articles as something distinct from the realty, in short, as personal property. This being so, the rule, which requires that effect shall be given to every part of a contract according to the manifest intention of the parties as expressed by the language employed, also requires us to hold that the intention of the parties to what is known as the bank mortgage, was to regard the machinery as personal

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property, and to include it in the mortgage as such. They took their mortgage, therefore, subject to the prior chattel mortgage of the appellant on the personal property. It is suggested that this mortgage is not in the record, because in copying the bill of exceptions containing the evidence into the transcript, after stating that the mortgage had been read in evidence, instead of copying the mortgage, reference is made to a previous page of the transcript where the mortgage read in evidence is copied as an exhibit filed with the answer of the bank. This was sufficient. It was not necessary to copy it again, although it was presumably copied in the bill of exceptions as filed. When a paper is once copied into the transcript, it is not necessary to copy it again when introduced into subsequent parts of the record, provided it be so referred to as that it can be identified with certainty. *Voorhees v. Hushaw*, 30 Ind. 488.

Some suggestions are made in the briefs respecting alleged infirmities in the assignment of errors, and in respect to a defect of parties. The length of the opinion forbids that we should notice these suggestions further than to say they do not involve any error, nor do they relate to the merits of the case. No objection pertaining to the alleged defect of parties seems to have been made in the court below.

The conclusions thus reached result in a reversal of the judgment. The judgment is accordingly reversed, with costs, with directions to the court below to sustain the appellant's motion for a new trial, and for further proceedings not inconsistent with this opinion.

Filed Jan. 30, 1889.

No. 14,496.

THE STATE, EX REL. MARKS, *v.* VOGEL ET AL.SPECIAL FINDING.—*Exception to Conclusions of Law.—Admission as to Facts.*

—A party, by excepting to conclusions of law drawn by the court from a special finding of facts, admits that the finding is full and correct.

SAME.—*Pleading.—Supreme Court.—Practice.*—Where a plaintiff's case must stand or fall by the facts specially found by the court, and admitted to be correctly found, an alleged error in overruling a demurrer to an answer will not be considered on appeal.

TOWNSHIP.—*Highway.—Illegal Expenditures by Trustee.—Reimbursement of Township by County.—Action on Trustee's Bond.*—Although the acts of a township trustee in laying out a highway and building a bridge thereon are negligent and illegal, yet if, after the work is done, the county commissioners donate funds from the county treasury which fully reimburse the township for all expenditures in opening the highway and building the bridge, no action can be maintained by the township on the trustee's bond.

From the Perry Circuit Court.

E. E. Drumb, for appellant.

C. H. Mason and *W. Henning*, for appellees.

COFFEY, J.—This was a suit in the court below by the appellant, Marks, as the trustee of Troy township, in Perry county, against appellee Gottlieb Vogel, and his sureties, upon his official bond as the former trustee.

The breaches of the bond alleged in the first paragraph of the complaint are, that the said Gottlieb Vogel, while in office, as such trustee of Troy township, received of the funds of said township the following amounts, to wit: Fifty-six dollars belonging to the township fund, two hundred and thirteen dollars belonging to the road funds of said township, and thirty-nine dollars belonging to the special school fund of said township, in all the sum of two hundred and sixty-nine dollars; that he had said funds on hand at the time his office expired, and that he failed and refused to turn the

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150	442
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same over to the appellant, Marks, upon demand, or to in any way account for the same.

The breaches in the bond alleged in the second paragraph of the complaint are, that the defendant Gottlieb Vogel, while in office, as trustee of Troy township, received two thousand dollars belonging to the township funds of said township, and three thousand dollars belonging to the road funds of said township; that he unlawfully employed one Henry Aberding to erect a new bridge over and across Windy creek in said township, at a cost of \$213, not having notified the board of commissioners of the necessity of said bridge, not having procured a survey and estimate thereof, and not having procured an order regulating the erection of the same; that said bridge was erected in such an unskilful and negligent manner that it was worthless and fell down of its own weight; that the defendant Gottlieb Vogel, as such trustee, well knowing the worthless condition of said bridge, paid the said Henry Aberding for the erection of the same the said sum of \$213 out of the road funds of said township; that he unlawfully charged and retained out of the township funds of said township the sum of \$56 for superintending the erection of said bridge, and for supervising the opening of a new road; that his report to the board of commissioners claiming credit for said sums was rejected and said claims disallowed.

The defendant Gottlieb Vogel filed his separate answer to this complaint. The first paragraph is a general denial.

The second paragraph is substantially as follows:

That as trustee of Troy township in said county he was ordered by the board of commissioners of Perry county, at a special term held in September, 1887, to open a certain road in first order described in said township, leading from Tell City to Troy; that not having sufficient road funds on hands, and the means necessary to open said road, the said board agreed to advance whatever funds might be required to perform said work, and ordered the defendant to proceed and

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construct said road ; that pursuant to said order he did open said road and notified the said board of such fact ; that said board at once carefully examined said work and accepted the same, and at its December term, 1887, entered of record an order to that effect, and issued an order in favor of said defendant for the sum of \$2,080.28 with which to defray the expenses of said work, and directed him to pay for the same according to his account then exhibited to them and examined, approved and allowed by them ; that pursuant to said order and allowance he paid for said work ; that he filed his report as such trustee with said board at the April term thereof, 1888, which included the expense of opening said road and the allowance of said \$2,080.28, but that said board on some wrong and trifling pretence refused to allow the bill formerly allowed by them of \$2,080.28, and by him expended in opening said road, and deducted therefrom \$213, which is the same item mentioned in the complaint and for which suit is brought, falsely and wrongfully pretending that said work was not properly constructed ; that said item of \$213 and an item of \$56 for services due plaintiff for superintending said work were rejected by said board ; that the same are justly due him, together with \$20 for services in visiting schools in 1887, and that he is in no manner indebted to said township ; wherefore he files said items of account as a set-off against the plaintiff's demand, and asks that they be allowed.

The other defendants answered by a general denial.

The plaintiff demurred to the second paragraph of the answer of Vogel, upon the ground that the same did not state facts sufficient to constitute a defence to the plaintiff's cause of action.

The demurrer was overruled and the plaintiff excepted. Plaintiff then filed a general denial in reply to the second paragraph of said answer, and the cause, being at issue, was submitted to the court for trial without the intervention of a jury. At the request of the plaintiff the court made a special finding of the facts and its conclusions of law thereon.

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After finding the formal facts of the election and qualification of Vogel as the trustee of Troy township, that his term of office had expired, and that the relator, Nicholas Marks, was the duly elected and qualified successor in office of the said Vogel, the court finds that during the time the said Vogel was acting as trustee of said township of Troy he proceeded to erect, lay out and establish a new road in said township, known as the New Troy and Tell City Road, and also erected and built at the expense of said township a certain bridge upon said road; that the total expense of said road and bridge was \$2,080; that the cost of said bridge was \$213, which the said Vogel paid to one Henry Aberding, who had contracted for the building and construction of the same, and the said Vogel also retained the sum of \$56 for his services for superintending the erection of said bridge and the opening of said road, all of which money was paid by him out of the road funds of said township; that the said Vogel did not, prior to the laying out of said road and erection of said bridge, first procure from the board of commissioners of said county of Perry any estimate or survey thereof, nor any order or direction from said board regarding the opening of said road or erection or construction of said bridge; that afterwards, at the December term, 1887, said board made an order reimbursing the road fund of said township for all the material furnished, labor performed, and all expenses that the township incurred in the establishment of the said road and the construction and erection of said bridge, to wit, the sum of \$2,080, which included the said \$213 for said bridge and the said \$56 for said Vogel's services as superintendent. The court further finds that the said bridge was constructed in an unskilful and defective manner, and was worthless as a bridge in the condition in which it was; that the said board of commissioners, after making a careful examination of said new road, and after proper advisement in the premises, found that the necessary expenses incurred by said township in the construction of said road were greater

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than the road fund of said township was then able to meet, or would be able to liquidate, in the near future, and they found it legally proper that the county should pay the expenses incurred in the location of said highway, and thereupon made said allowance of \$2,080 to said Vogel as trustee, to be applied by him to the reimbursement of said road fund in full for all expenses incurred to the said fund in the establishment of said road, and that said Vogel in fact applied said money to the payment of said road and bridge work.

The court finds that the payment of said sum of \$2,080 by said board of commissioners necessarily included the payment of the said sums of \$213 and \$56 for said bridge and services of said Vogel, and that, therefore, the said township is not out anything, and has not lost anything by reason of the said bridge being defective and worthless, or by reason of the expenditure by said Vogel of said sums of \$213 and \$56.

From these facts the court makes the following conclusions of law: *First*, that the defendants are not liable on said Vogel's bond for the acts complained of; and, *secondly*, that the plaintiff and relator is not entitled to recover anything by virtue of the premises, and that the finding ought to be for the defendants.

To each of the conclusions of law the appellant excepted. The defendants had judgment for costs, and the plaintiff appeals therefrom to this court, and assigns as error:

1st. That the court erred in overruling the demurrer to the second paragraph of the answer of the defendant Gottlieb Vogel; and,

2d. That the court erred in its conclusions of law on the special findings.

By excepting to the special conclusions of law the appellant admits that the facts in the case are fully and correctly found. *Robinson v. Snyder*, 74 Ind. 110; *Fairbanks v. Meyers*, 98 Ind. 92; *Bass v. Elliott*, 105 Ind. 517; *Wynn v. Troy*, 109 Ind. 250; *Warren v. Sohn*, 112 Ind. 213.

We have not, therefore, inquired into the question as to

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whether the court erred in overruling the demurrer of appellant to the answer of the appellee Vogel, as it is evident that the case for the appellant must stand or fall by the facts found by the court. *Martin v. Cauble*, 72 Ind. 67.

It may be conceded that the acts of Vogel in laying out, establishing and opening the road referred to in the special finding, without an order of the board of commissioners, was unauthorized and illegal. So, also, was his action in building the bridge therein named. But it appears from the finding that, after all the work had been done, the board of commissioners of Perry county furnished the funds from the county treasury to fully reimburse Troy township for all her expenditures in opening the road and in the building of the bridge, and that the same was in fact paid out of this donation from the county. We are unable to conceive of any principle of law or justice by which Troy township can claim to be twice reimbursed for this outlay of money; and if it has been reimbursed by Perry county, it is self-evident that if Vogel and the sureties on his official bond are required to pay the money for which this suit is prosecuted, such will be the result. If Vogel had furnished the \$2,080 with which to pay the expense of opening the road and building the bridge out of his private funds, it certainly would not be contended that he should pay the claim now in suit, because Troy township has lost nothing.

How does it concern the township whether the money was furnished by Vogel or by some other person, so long as it loses nothing by the transaction?

We do not think the court below erred in its conclusion of law upon the facts found. We think the judgment of the court below should be affirmed.

Judgment affirmed.

Filed Jan. 30, 1889.

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No. 12,555.

SMOCK, GUARDIAN, v. REICHWINE ET AL.

DECEDENTS' ESTATES.—Sale of Real Estate.—Insane Widow.—Guardianship.—The guardian of a decedent's insane widow had the right to file a written assent for his ward to the petition of the executor in a proceeding instituted in the common pleas court to sell real estate for the payment of the decedent's debts.

SAME.—Partition Proceeding.—Adjudication of Widow's Title.—Where, after such sale, the guardian brought suit for the partition of the remaining real estate, the common pleas court had jurisdiction in the partition case to adjudicate upon and divest the title of the widow to the real estate sold by the executor to pay the decedent's debts.

SAME.—Widow Takes as Heir.—Parties.—The widow takes the interest that the law gives her in the real estate of which her husband dies seized, as heir, and not by virtue of her marital rights. She is a proper party to a petition to sell real estate for the payment of the decedent's debts.

From the Marion Superior Court.

G. W. Galvin, A. C. Harris, W. H. Calkins, C. F. Rooker and *A. W. Hatch*, for appellant.

A. W. Hendricks, O. B. Hord, A. Baker, E. Daniels, J. S. Duncan, C. W. Smith and *J. R. Wilson*, for appellees.

BERKSHIRE, J.—This is an appeal from the judgment of the Marion Superior Court rendered in general term reversing the judgment of the court given in special term.

At the November term, 1883, special term, the appellant, in behalf of his ward, filed his amended complaint in partition, in one paragraph.

To the complaint as amended the appellees filed their joint answer in two paragraphs, and their joint cross-complaint in one paragraph.

Demurrers were filed by the appellant to each of said paragraphs of answer and to the cross-complaint.

The court in special term sustained the demurrers, and the

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appellees refusing to amend their pleadings, judgment was rendered for the appellant.

The appellees appealed from this judgment to the general term of said court, and in general term the court overruled the demurrers to the answers and cross-complaint and reversed the judgment given in special term.

From the judgment given in general term the appellant appeals to this court.

The complaint is for the partition of real estate, and contains the usual averments and some additional averments.

It alleges that the appellant's ward is the widow of Matthew Little, who died in the year 1861, seized in fee of the real estate which it describes, and that as such widow Cornelia E. Little, the ward, became the owner in fee of an undivided one-third of the said real estate, and that the defendants, Sarah A. Little, John W. Murphy, the city of Indianapolis and the appellees are the owners in fee of the undivided two-thirds of said real estate.

The answer of the appellees is an answer in confession and avoidance, the general denial not having been filed.

The second paragraph of answer and the cross-complaint go somewhat more into detail than the first paragraph, but the facts as averred are substantially the same in all.

It is stated that Matthew Little died in the year 1861, leaving the ward of the appellant as his widow, and seized of the following real estate in Marion county, Indiana :

The property involved in this litigation ; also lot numbered four (4), and eighteen and one-third feet off of the east side of lot numbered five (5), in square sixty-one (61) in the city of Indianapolis ; also the undivided one-third of lot numbered six (6), and forty-nine and two-twelfths feet off of the west side of lot numbered five (5), in square sixty-one (61) in the city of Indianapolis.

It is averred that Matthew Little died testate, and that shortly after his death his will was admitted to probate and Samuel I. Little became executor of the estate.

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Item *first* of the will is copied into the answer and cross-complaint, and it is stated that this is the only item in the will referring to the said Cornelia E. Little.

By his will the testator devised to the said Cornelia E. Little the equal one-third of all the real estate of which he died seized, free from incumbrances, and the equal one-third of all the personal and mixed property left by him.

Whether she took the estate by inheritance or as devisee is not material to our conclusion, and is therefore not considered.

Her rights were substantially the same in either event.

It is averred that the testator died largely indebted, and that it became necessary to sell a portion of the real estate left by him, to pay the indebtedness, and to that end the executor filed his petition in the common pleas court of Marion county, at the December term thereof, 1865, in which he asked for an order to sell the particular tract of land in controversy; that the appellant's ward and the other heirs of the decedent were named in the petition, and the requisite notice given; that an inventory and appraisement were filed and such other steps taken that, on the 15th day of March, 1866, the said court ordered the *whole* of said parcel of land sold; that afterwards, and on the 1st day of September, 1866, notice thereof having been previously given, the executor sold said real estate in parcels, one parcel to Edward C. Brundage, who afterwards sold and conveyed by warranty deed to the appellee Holle; another parcel to H. S. Mayo, who afterwards sold and conveyed by warranty deed to the appellee Blake, and a third parcel to Margaret J. Hyde, under whom the appellee Reichwine claims title; that the purchasers at the said sale understood and believed that they were buying the entire estate in the several parcels which they purchased, and the executor understood that he was selling the entire estate.

It is further averred that, on the 18th day of June, 1867, in order to forever put at rest all question as to whether or

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not the said purchasers acquired all the interest, right and title of the said Cornelia E. Little in and to the said real estate, she, through her guardian, who had been theretofore appointed because of the fact that she was a person of unsound mind, came into the said court of common pleas for said Marion county, and he filed his written consent, as such guardian, that the said sales be taken and held as valid and binding as to his said ward, and as disposing of her interest in and to said real estate. Before the filing of said written consent, it was agreed by and between the said guardian, for his said ward, and the said heirs of the said decedent, and the said executor, that the said Cornelia E. Little should receive the full one-third of all the real estate of which the said testator died seized, out of the remainder of said real estate; that after the making of said agreement and the filing of said written consent, the said executor reported said sales to the court, and, pursuant to its order then and there made, he executed deeds to the said purchasers thereat; that the appraisers, who were appointed to appraise the said real estate, appraised the entire estate at the sum of \$9,000, and the sales thereof amounted in the aggregate to \$9,957.95.

It is further averred that thereafter, and at the same term of said court, and pursuant to the said agreement, the said Cornelia E. Little, through her said guardian, filed in said court her petition for partition of the real estate owned by the said Matthew Little at the time of his death; that to this petition the said heirs and executor were made defendants, and being all adults entered their appearance thereto; that the said petition averred, among other things, the death of Matthew Little, and that the said ward was his widow, the execution and probate of his will, and its provisions as to his said widow, as hereinbefore stated, and describing all of the real estate of which he died seized, the agreement that had been made as to her interest in the tract of land that had been sold, and that the same was to be adjusted by allowing to her the value thereof in the partition of the remaining

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real estate ; that there was realized from her one-third interest in the said real estate sold the sum of \$3,214.47.

The prayer of the petition was for partition, and that a portion in value equal to her undivided one-third interest therein, and an additional portion equal to the value of her interest in the real estate that had been sold by the executor, be set off and assigned to her in severalty.

It is further averred that the defendants filed an answer confessing the allegations of the petition, and that the cause was submitted to the court and such proceedings had that commissioners were appointed to set off and assign to said widow out of said unsold real estate a portion equal to her undivided one-third interest therein, and an additional quantity equal in value to her said interest in the said parcel of land sold by the executor ; that afterwards, and at the same term of said court, the said commissioners made their report setting off and assigning to said Cornelia E. Little out of said unsold real estate the following, to wit: the undivided one-third of lot numbered six (6), and forty-nine and two-twelfths feet off of the west side of lot numbered five (5), in square sixty-one (61) in the city of Indianapolis, and said commissioners further reported as a part of their said report that the said real estate so set off and assigned to the said Cornelia E. Little was of as great value as the undivided one-third interest held by her in the real estate partitioned, and added thereto the said sum of \$3,214.47 on account of her interest in the real estate that had been sold by the executor ; that the said report was approved and the partition as made confirmed, and the report spread of record as a part of the judgment of the court ; all of which was done at the same term of court at which the action was commenced.

It is further averred that the real estate set off to the said Cornelia E. Little greatly exceeded in value the full value of one-third of all of the real estate of which the said Matthew Little died seized, and was more productive than the remainder thereof, and much more beneficial to the said widow

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than any other part or parcel that could have been set off to her as her portion of said real estate.

The demurrers admit the facts as pleaded in these paragraphs of answer and cross-complaint.

If the facts as pleaded are true, the appellant's case is barren of all equity and rests wholly upon a mere technicality.

The equity of the case seems to be entirely with the appellees.

The rightfulness of the judgment of the superior court in general term depends (1) upon the jurisdiction of the common pleas court to receive and pass upon the written assent filed by the guardian of Cornelia E. Little, in the matter of the petition to sell real estate to pay debts filed by the executor pursuant to the agreement that had been made, and how the order that was made thereafter, directing the executor to make deeds to the purchasers, and the approval thereof, affected her title to that particular real estate; and (2), whether the common pleas court had jurisdiction in the partition case to adjudicate upon and divest the title of the said widow to the said real estate.

The jurisdiction of the court of common pleas at the time the foregoing proceedings were before it depended almost wholly upon statute law.

At the time the proceedings in question were transpiring the court of common pleas had exclusive jurisdiction in all matters of probate, including guardianships. 2 G. & H., p. 20, section 4; 2 G. & H., p. 483, section 1; 2 G. & H., p. 563, section 1; 2 G. & H., p. 574, sections 2, 3.

It was made the duty of the guardian to manage the estate for the best interest of his ward. 2 G. & H., p. 567, section 9, clause 2.

The guardian had power to join in and assent to the partition of real estate belonging to his ward. 2 G. & H., p. 572, section 23; 2 G. & H., p. 575, section 8.

Whenever an executor or administrator discovered that the personal estate of a decedent was insufficient to pay debts,

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it became his duty to file a petition for the sale of real estate, in the common pleas court, to pay debts. 2 G. & H., p 506, section 75.

It was made his duty to state in the petition the names of the heirs.

The point is made that the widow takes the interest that the law gives her in the real estate of which her husband dies seized by virtue of her marital rights, and not as heir, and therefore she is not a proper party to a petition to sell real estate for the payment of debts.

We do not concur with counsel in this position.

The Legislature provided forms to be used in the settlement of decedents' estates, and these forms were a part of the statute governing the settlement of decedents' estates in force at the time the proceedings in question were being transacted. The form given for the petition to sell real estate to pay debts names the widow as an heir. 2 G. & H., p. 546, form 28. But this court has decided that, under the statute of descents (R. S. 1881, section 2483), in force when Matthew Little died, the widow takes as heir, and not by virtue of her marital rights. *Hendrix v. McBeth*, 87 Ind. 287; *Richardson v. Schultz*, 98 Ind. 429.

The statute provided for the giving of notice when an administrator or executor filed a petition to sell real estate for the payment of debts. It further provided that adult persons might waive the notice by filing their assent to the sale in writing, and that guardians might assent in like manner for their wards. 2 G. & H., p. 507, section 77.

This statute was applicable to guardians of insane persons. It was made so by virtue of section 8, p. 575, *supra*.

In view of all these statutory provisions, we have come to the conclusion that the guardian of an insane widow may file his written assent, when a petition has been filed by the executor of her deceased husband to sell real estate for the payment of debts, consenting that her interest in the real estate may be sold, if in his judgment it will be to her ad-

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vantage that he do so ; and, followed by a proper order made by the court, and a sale made thereunder, the result would be to divest her title.

But it is not necessary for us to decide that what was done in the particular case in question, standing alone, and independent of the action in partition, had the effect to divest her title.

This leads us to a consideration of the proceedings in partition, and the effect of the judgment therein rendered. Immediately upon the closing up of all proceedings under the petition by the executor to sell for the payment of debts, the guardian filed his petition for partition.

The heirs and executor entered their appearance thereto. At that point in the proceedings there can be no question but that the court had jurisdiction over the person of each of the parties, and of the subject-matter of the action. It had jurisdiction to settle all questions of title between the parties that were incident to the final result of the action. *Bourgette v. Hubinger*, 30 Ind. 296.

The complaint which the guardian filed, as we have seen, contained something more than the ordinary averments in a complaint for partition. The manner in which the title came to Cornelia E. Little is stated, and the sale of her one-third interest in the real estate sold by the executor to pay debts is recited, together with the arrangement which had been made between the heirs and the guardian and the executor as to the repayment to the ward, Cornelia E. Little, for her said interest, by assigning and setting off to her out of the remaining real estate, in addition to her one-third interest therein, a quantity equal in value to that which was sold.

The defendants confessed the petition, the case was submitted to the court, and an order made to set off to the said ward the undivided one-third of the said real estate remaining unsold, and an additional quantity to come out of the same, equal in value to her said interest in the real estate sold by

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the executor. Partition was made and confirmed in accordance with the order.

If the complaint in the action for partition had contained a description of all the real estate of which Matthew Little died the owner, and partition had been asked for, and the identical parcels of said real estate set off to the appellant's ward that were assigned to her, there can be no question but that her title to the real estate sold by the executor would have been divested. What was done, we think, was that in substance, if not in letter.

The conclusion, it seems to us, necessarily follows, that the question as to whether the title of Cornelia E. Little was divested by the executor's sale was put in issue and determined in the partition case in the common pleas court, and is not now an open question.

The determination of that question was absolutely necessary to the order of partition and the final judgment that was rendered confirming the commissioner's report. *Gavin v. Graydon*, 41 Ind. 559, and cases cited.

The judgment of the superior court is affirmed, with costs.

Filed Jan. 30, 1889.

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No. 13,257.

THE PHOENIX INSURANCE COMPANY v. ROWE.

INSURANCE.—*Ownership of Property.*—*Pleading.*—An allegation in a complaint on an insurance policy that the plaintiff, from the date of the risk until the destruction of the property by fire, "had an insurable interest as the owner thereof to its full value," is a sufficient averment of ownership.

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SAME.—Abstract of Title.—A plaintiff, in an action upon an insurance policy, can not be required to furnish an abstract of his title, in pursuance of section 363, R. S. 1881.

SAME.—Execution of Policy.—Failure to Deny Under Oath.—Interrogatories to Jury.—A failure to deny the execution of the policy, which is properly set out as the foundation of the action, by a pleading under oath, is so far an admission of its execution as to preclude further controversy on that subject, and interrogatories to the jury upon the subject of its delivery are irrelevant, and answers thereto can not overthrow the general verdict.

From the Posey Circuit Court.

W. P. Edson and F. D. Wimmer, for appellant.

E. M. Spencer, A. P. Hovey and G. V. Menzies, for appellee.

MITCHELL, J.—This was an action by Rowe against the insurance company, to recover on a policy of fire insurance alleged to have been executed on the 26th day of September, 1884, covering a dwelling house and certain personal property therein, in which, it is alleged, the plaintiff, from the date of the risk until its destruction by fire, on April 4th, 1885, had an insurable interest as the owner thereof to its full value.

There was a second paragraph of complaint which counted upon a parol contract of insurance, but it is not material that this paragraph should be noticed further.

It is contended that the ownership of the property is not sufficiently alleged in the complaint, especially, because there is a stipulation in the policy, a copy of which is set out as an exhibit, to the effect, that if the "insured shall not be the sole and unconditional owner in fee of said property, * * then this policy shall be void."

There is no merit in the objection. One who has an insurable interest in property as owner to the full extent of its value, is presumably the sole and unconditional owner. A general averment that the plaintiff, at the inception of the policy and at the time of the loss, was the owner of the property destroyed, is sufficient to admit evidence of any in-

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terest he may have had, without further averment. *Aurora Fire Ins. Co. v. Johnson*, 46 Ind. 315.

There was no error, prejudicial to the substantial rights of the appellant, in the ruling of the court in overruling the motion to make the averments in the complaint more specific in respect to the ownership of the property. We can conceive of no good reason why a plaintiff in such a case should be required to set out his title or interest in the property destroyed, specifically and with great particularity, nor do we see any reason why he should be required to furnish an abstract of his title, in pursuance of the provisions of section 363, R. S. 1881, as was insisted upon by a motion for that purpose in the present case. While the granting or refusing of such motions is not a matter wholly within the discretion of the *nisi prius* courts, it is nevertheless so far discretionary that a reversal would not follow, except in a case where it appeared that the rights of the party complaining may have suffered. This is not such a case.

Upon issues duly made the case was tried by a jury, who returned a general verdict for the plaintiff, with answers to special interrogatories.

The appellant contends that the answers to the special interrogatories are so inconsistent with the general verdict that no judgment could properly be rendered thereon for the plaintiff. The case is argued as though the execution of the policy declared on in the first paragraph of the complaint had been put in issue by the pleadings, and so it is contended that the answers to the interrogatories show that the policy sued on had never been delivered to the plaintiff, or, if delivered, that the agent had, as the plaintiff well knew, no authority to do so without first demanding payment of the premium, the premium not having been paid until after the loss.

It must be remembered, however, that the first paragraph of the complaint counts upon an executed policy of insurance, a copy of which is exhibited with the complaint.

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There is no answer putting the execution of the policy in issue. There is a general denial and numerous pleas in confession and avoidance. All of these answers proceed upon the theory that the policy was duly executed—which, of course, includes the delivery to the plaintiff—as charged in the complaint, but, with the exception of the general denial, present or assume to present some affirmative defence in avoidance of the policy so executed.

All the interrogatories and the answers returned by the jury, relating to the execution of the policy or the authority of the agent to deliver policies without requiring prepayment of the premium, were, therefore, irrelevant to any issue in the case. It should be stated that there was no answer involving any question of fraud or collusion between the plaintiff and the agent of the insurance company in obtaining possession of the policy.

A failure to deny the execution of an instrument, which is properly set out as the foundation of the action, by a pleading under oath, has been held to be so far an admission of its execution as to preclude further controversy on that subject. "The defendant ought to know better than anybody else whether he executed the note in suit or not, and if he will not deny it under oath, by a general or special *non est factum*, there is no hardship in holding the execution admitted." *Evans v. Southern Turnpike Co.*, 18 Ind. 101. *Home Ins. Co. v. Gilman*, 112 Ind. 7, 11; *Carver v. Carver*, 97 Ind. 497; *Woollen v. Whitacre*, 73 Ind. 198.

In this view of the case, there can be no serious question but that the answers to the special interrogatories and the general verdict are consistent with each other. It is true, the jury answer that the plaintiff never furnished any proofs of loss, but as the stipulation in the policy requiring notice and proof of loss may have been waived by the company, this answer can not be regarded as in conflict with the general verdict.

There are other questions in the record relating to rulings

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of the court upon the admissibility of evidence, and involving certain instructions given and refused, but as on examination of the questions so presented, all relate in one way or another to the authority of the company's agent to deliver the policy, these questions are disposed of by the suggestion already made that the execution of the policy was not in issue.

The judgment is therefore affirmed, with costs.

Filed Jan. 31, 1889.

No. 13,537.

LEWARK v. CARTER ET AL.

JUDICIAL SALE.—Personal Property.—Title Taken by Purchaser.—The purchaser of personal property at a sale under execution takes only the title and interest of the judgment debtor.

SAME.—Defective Title.—Liability of Sheriff.—There is no warranty in judicial sales, and if the sheriff sells personal property in good faith, he is not responsible to the purchaser for any defect in the title.

SAME.—Liability of Execution Plaintiff.—Representations of Deputy Sheriff.—Representations by a deputy sheriff at the time of selling personal property that the title is good, will not render the execution plaintiff liable to a purchaser, upon a failure of title, unless the representations were made by his procurement.

SAME.—Sheriff's Liability for Representations of Deputy.—A sheriff is not liable to a purchaser, on account of representations made by his deputy as to title, where the statements are made in good faith in the belief that they are true, as in such case there is no fraud.

SAME.—Duty and Authority of Deputy.—Statements made by a deputy sheriff concerning the title to property offered for sale on execution, are outside of his duty and authority.

PLEADING.—Amended Complaint.—Refusal of Leave to File.—It is not error on the part of the trial court to refuse leave to a plaintiff to file an

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amended complaint, after all the evidence has been introduced, which involves an entire change in the theory of the plaintiff's case.

From the Marion Superior Court.

D. V. Burns and *A. Seidensticker*, for appellant.

F. Rand, *J. M. Winters* and *R. Clarke*, for appellees.

COFFEY, J.—This action was brought by the appellant in the Marion Superior Court against the appellees, George H. Carter, sheriff of Marion county, and Fletcher & Churchman, to recover money paid by him on his bid for a horse sold by Carter at sheriff's sale.

The cause was tried by a jury, who returned a special verdict. On this verdict judgment was rendered for the defendants.

Lewark appealed to the general term of the superior court, where the judgment of the special term was affirmed, and he now appeals to this court, where, as in the general term, he calls in question the correctness of the judgment on the special verdict.

The material facts in the case, as set forth in the verdict of the jury, are: That appellee Carter, as the sheriff of Marion county, held an execution issued upon a judgment rendered in the Marion Superior Court in favor of his co-appellees, Fletcher & Churchman, against Oliver P. Castle, Charles B. Hitchcock, Charles F. Cleaveland and Robert H. Adams. Carter, as such sheriff, at the request of Fletcher & Churchman, the plaintiffs in said judgment, levied said execution on a certain bay horse as the property of the execution defendants. Due notice of the time and place of sale of the horse was given, and at the sale appellant became the purchaser, and paid the purchase-price; and Carter, after satisfying the costs out of the money, paid the residue to the judgment plaintiffs, Fletcher & Churchman, in part satisfaction of their judgment.

Before the levy of said execution, Hitchcock informed Corbaley, one of Carter's deputies, who was at the time in

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quest of property on which to levy the same, that he, Hitchcock, did not own the horse; and one Glazier, the bookkeeper of Adams, told said Corbaley that the horse belonged to one Harry Walker.

The sale was made by Harding, another of Carter's deputies, who at the time, and in making the sale, in answer to a question put to him, publicly, by one William O. Patterson, at the sale, said that the title to the horse was clear and all right; and the plaintiff, hearing the statement, and relying on it, and believing it to be true, made his bid, but would not have bid had such statement not been made.

At the time Harding made the statement he had no knowledge as to whether it was true or not, and no actual intention of deceiving any one thereby, but believed the same to be true.

The execution defendant Hitchcock had owned the horse, but had sold it, before the execution plaintiffs, Fletcher & Churchman, had obtained their judgment, to his co-defendant Adams, who, before the date of said judgment, sold it to Harry Walker. Walker had entrusted the possession of said horse to the firm of Cleaveland & Brown, successors to Cleaveland & Adams, who were execution defendants.

Walker had no knowledge that the horse had been levied upon until after the sale. He brought an action against the appellant for possession of the horse, in the proper court, and recovered. The appellees were notified of the pendency of the action, and requested to defend it, but they failed to do so. After the termination of that action appellant demanded of the appellees repayment to him of the amount bid for said horse, which was refused.

A sale of personal property under execution passes only the right, title and interest of the judgment debtor. If the debtor has no interest, none passes by the sale to the purchaser. There is no warranty in judicial sales, and if the sheriff sells *in good faith*, he is not responsible to the purchaser for any defects in the title. A sheriff is only

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a ministerial officer, and does not warrant anything in connection with the sale by him of property upon an execution lawfully in his hands. The purchaser stands in the situation of a purchaser of real estate who has taken a conveyance without warranty. The purchaser has a right to what he gets, and no more. *Caveat emptor* is the rule. He can not avoid payment by showing that the goods belonged to some one else; but, if an innocent purchaser, he may have redress in equity against the execution debtor whose debt he has paid. *Harrison v. Shanks*, 13 Bush, (Ky.) 620; *State, ex rel., v. Prime*, 54 Ind. 450; *Brunner v. Brenman*, 49 Ind. 98; *Neal v. Gillaspie*, 56 Ind. 451; Rorer Judicial Sales, section 1051.

We think it clear, from these authorities, that, in the absence of the representations made at the sale, none of the defendants could be held responsible for the failure of title to the horse purchased by the appellant. It remains to inquire whether, by reason of such representations, they, or any of them, became liable to refund to the appellant the money paid by him for the horse to which the execution defendants had no title.

It appears that the horse was levied upon by the direction of the appellees Fletcher & Churchman. It also appears that the horse had previously belonged to the execution defendants, but that he had been sold. At the time of the levy he was not in the possession of the owner, and there is nothing in the finding to indicate that Fletcher & Churchman, at the time they directed the levy, were acting in bad faith. They were not present at the time the representations were made, and they were made without their knowledge or procurement. If they are liable, therefore, it must be because they sustained such a relation to the sheriff as principal and agent, or otherwise, as rendered them liable for the conduct of the sheriff in conducting the sale.

Murfree on Sheriffs, at section 1002, states the law thus: "While it is true, that in a certain sense, and for some pur-

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poses, the sheriff may be regarded as the agent of the plaintiff, he is not such agent in conducting a sale under execution, and in the absence of proof of actual instructions, given by the plaintiff, and followed by the officer, the former can not be held responsible for misrepresentations of title, or other material circumstances, made by the latter. He is not like an auctioneer, the agent of both parties, but of the law, and is presumed, in the absence of proof to the contrary, to have acted strictly according to the mandate of his writ. The rule of *caveat emptor* can only be modified so as to charge the plaintiff by representations or guarantees, made by the sheriff or other persons on behalf of the plaintiff, and brought home to the latter by sufficient proof." See, also, *Weidler v. Farmers Bank*, 11 Serg. & Rawle (Pa.), 134.

In the absence of some proof that the representations of the deputy sheriff were made by the procurement of the appellees Fletcher & Churchman, we do not think that they can be held responsible. The verdict of the jury is presumed to find every fact in the case warranted by the proof, and as it does not appear from such verdict that these appellees had any connection with the representations made at the time of sale, we hold that they are not liable to appellant.

Is the appellee Carter liable to the appellant on account of the representations made by his deputy?

It may be conceded that a sheriff is liable for the defaults of his deputies by nonfeasance or malfeasance in the duties of their office, enjoined by law, and that their acts and omissions are to be regarded, when within the scope of their authority, as his acts and omissions. *Snell v. State, ex rel.*, 43 Ind. 359; *Marshall v. Hosmer*, 4 Mass. 60.

It is no part of the duty of a deputy sheriff to make representations as to the title to the property he sells on execution. His plain duty is to follow the commands of his writ, and his statements in relation to the title of the property are not within the scope of his authority. In this case, however, it appears that the deputy made the representations in good

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faith and without any intention of deceiving any person thereby, and believing them to be true. The modern doctrine undoubtedly is, that fraud may exist without knowledge of the untruth of the representations made to induce a party to enter into a contract. But it must appear that such representations were fraudulent.

Representations made for an honest purpose, and with fair reason for believing them to be true, are not fraudulent, although it may turn out that they were not true. *Furnas v. Friday*, 102 Ind. 129; *Watson Coal, etc., Co. v. Casteel*, 68 Ind. 476.

In our opinion it does not appear that the representations made by Harding at the sheriff's sale were fraudulent. For this, and the reasons stated above, we are of the opinion that the appellee Carter is not liable in this action.

After the testimony in this case had all been introduced, the appellant offered to file an amended second paragraph of complaint, which the court, on objection made by the appellees, refused to allow. The amended second paragraph offered by appellant is set out in a proper bill of exceptions, and appears to be a complaint seeking to set aside the sale made by the sheriff, on substantially the facts set up in the complaint in this cause. Had the court permitted appellant to file this amended paragraph, it would have become necessary to make issues upon it, the mode of trial would, perhaps, have been different from the one just closed, and the execution defendants, who were interested in maintaining the credit that had been entered by reason of the sale of the horse, would have been entitled to be heard. We do not think the court erred in refusing to allow appellant to file this second paragraph of complaint. It was an entire change in the theory of the appellant's case.

We find no error in the record for which the judgment below should be reversed.

Judgment affirmed.

Filed Jan. 31, 1889.

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No. 13,112.

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133	334
117	212
153	459
117	212
169	642

REAL ESTATE.—Lien Created by Will.—Notice to Purchaser.—A purchaser of real estate is chargeable with knowledge of a lien created thereon by a will which constitutes a link in his chain of title.

SAME.—Executor.—Charge Upon Land.—Extinguishment.—Innocent Purchaser.—Where a testator devises land charged with the payment by the devisee of a sum of money to his estate, within a certain time, and the devisee, as executor of the will, charges himself with the sum to be paid by him, the charge on the land will be regarded as paid and extinguished as to subsequent good-faith purchasers.

SAME.—Settlement with Residuary Legatee.—Acquittance.—A settlement between the devisee executor and the residuary legatee of the testator's personal property, wherein the latter executes an acquittance for the amount charged upon the land devised to the testator, extinguishes the lien as against a subsequent good-faith purchaser.

SAME.—Quieting Title.—Lien in Favor of Third Person.—Where a complaint to quiet title alleges that the plaintiff is the owner of the land in fee, the defendant can not defeat the action by merely setting up an outstanding lien in favor of a third person.

SAME.—Right of Heirs to Enforce Lien.—Heirs or devisees can not set up and enforce a lien in favor of a testator's estate, to defeat an action by a purchaser to quiet title, at least not without showing that the executor has neglected or refused to do his duty.

SAME.—Estate on Condition.—Forfeiture.—An action to quiet title by one claiming the fee by conveyance from a devisee can not be defeated by the defendants on the ground that the devised estate was upon condition subsequent, unless they show that they are heirs and that they still own the reversion, as otherwise they are not entitled to enforce a forfeiture.

SAME.—Re-Entry.—Courts will not enforce a forfeiture of an estate upon condition subsequent where there has been no proper exercise of the right of re-entry.

From the Madison Circuit Court.

M. S. Robinson and *J. W. Lovett*, for appellants.

C. L. Henry and *H. C. Ryan*, for appellee.

ELLIOTT, C. J.—The complaint of the plaintiff, here the

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appellee, is a complaint in the ordinary form to quiet title. The facts pleaded in the second paragraph of the answer and in the cross-complaint are substantially the same, and we give a synopsis of the facts stated in the answer. The facts pleaded are, in substance, these: Conrad Crossley died the owner in fee of the land in controversy. He left a will containing, among others, these provisions:

"Item 3d. To my son, Corydon W. Crossley, I give and bequeath the following real estate: The undivided one-half of the southwest quarter of section thirty-six, town eighteen north, of range six east, also the sum of one thousand dollars, upon the following conditions: that he pay to my estate the sum of one thousand dollars upon the real estate already deeded to him, and the additional sum of one thousand dollars in consideration of the last above described real estate, said sum to be paid within ten years from the probating of this instrument."

"Item 8th. I give and bequeath to my beloved wife, Elvira, all my personal property after these bequests shall have been fulfilled, also the home farm on which we now reside during her natural life. At the death of my said wife I give and devise the real estate aforesaid to my daughter Caroline and my son Daniel Webster.

"Item 9th. The foregoing distribution will, in my judgment, equalize my property among my children, considering advancements already made to part of them not mentioned here. I do therefore give, devise and bequeath to my children aforesaid, and to their heirs, equally, the residue of my property and estate, both real and personal."

These are the only portions of the will set forth in the pleadings. Corydon W. Crossley was named as executor, the will was duly admitted to probate and he duly qualified. Corydon W. Crossley, after the testator's death, took possession of the land devised to him under the provisions of the will. Subsequently, he conveyed the land to James Jones, and by successive conveyances the land was conveyed to James H.

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Jones, the appellee. The sum of two thousand dollars mentioned in the will has not been paid, although more than ten years have elapsed since the will was admitted to probate. The cross-complaint principally differs from the answer in its prayer, for it prays that a lien for the sum mentioned in the will may be established and enforced. The first paragraph of the reply alleges that Corydon W. Crossley charged himself as executor with the sum of two thousand dollars, and that in purchasing the property the purchaser relied upon this act. The second paragraph of the reply also avers that Corydon W. Crossley charged himself as executor with the sum mentioned in the will, that the purchaser relied upon this act, and it further avers that the estate is yet unsettled; that he has fully settled with his mother, the widow of the testator, and that he has paid her all the money due her under the will and accounted to her for all property bequeathed to her. The third paragraph of the reply avers that the settlement was made with the widow.

An action to quiet title brings before the court the claims of all the parties, and they must be set up in that action. If there is a valid outstanding lien or title the plaintiff must fail, because he is not entitled to a decree cutting off such lien or title. *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 308.

If, therefore, there was a valid lien subsisting in favor of the appellants, the answer is good and the replies are all bad.

We have no doubt that the will charged the land devised to Corydon W. Crossley, nor do we doubt that this lien, unless paid or discharged, continued in force in favor of the estate of the testator as against purchasers from Corydon W. Crossley, for, as the will is one link in their chain of title, they are chargeable with knowledge of its provisions. *Porter v. Jackson*, 95 Ind. 210, and cases cited.

The leading question presented by the first and second paragraphs of the reply is, was the lien paid or discharged? The will makes the sum charged on the land payable to the estate, and when it was paid to the estate the lien was extin-

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guished. The first and second paragraphs of the reply show, in our judgment, that the sum charged on the land was paid. This we affirm for the reason that Corydon W. Crossley, the executor named in the will, represented the estate, and payment to him was payment to the estate. When he charged himself as executor with that sum, he paid the charge on the land, and thenceforth he and his sureties were liable on his bond. *Bona fide* purchasers, at all events, had a right to rely on his acts, for he represented the estate of the testator, and to no one else could payment have been rightfully made.

The questions presented by the third paragraph of the reply, while they mingle with those presented by the first and second paragraphs, are more difficult than the question we have discussed and decided.

The complaint avers that the plaintiff is the owner in fee of the land; that, although the defendants claim some interest in it, they have no title or interest nor any lien. These averments imply that the plaintiff owns the entire estate, free from any and all claims of the defendants. *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581; *Dumont v. Dufore*, 27 Ind. 263.

The answer, if it avoids these allegations at all, avoids them, upon the theory of counsel, by showing that a third person has a lien; it does not show, however, that such a person has any title. The general rule is that a plaintiff in such an action as this must recover upon the strength of his own title, but we can not perceive how this rule can apply where the defendant does no more than show an outstanding lien in a third person who is not a party to the action. An answer by a party to the action, which confesses that the fee is in the plaintiff, may, *pro tanto*, defeat the action, where it shows that the defendant holds a lien; that is, it may, at least, secure to the lienholder a provision in the decree reserving, protecting or enforcing his lien. This, however, is not the case here, for the answer confesses that the fee is in the plaintiff, and that a stranger holds an outstanding lien. We suppose that a plaintiff owning the fee may have his title

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quieted as against the persons made defendants, although a person not a party to the action may have a lien which he could enforce. The lien does not affect the title further than to create a burden on the land, for the owner of the fee has a perfect title as against all persons except the holder of the lien, and even as against the lienholder he has the title, subject only to the lien.

As the record presents this case, the plaintiff owns the fee, subject to a lien in a third person, and we can not conceive of any principle which will enable the defendants to employ that lien to defeat the owner of the fee. The plaintiff has title even as against the lienholder, subject, of course, to the lien, but not subject to the claims of any other person than the lienholder. The lienholder could unquestionably employ his lien to defeat a decree completely barring his rights; he could not, however, use it to directly and effectually destroy title. The lien is a claim that may be enforced, but it does not constitute a title to the land.

Regarding the claim created by the will as a lien, it must be held that, upon the facts stated in the pleadings, the only person who can enforce it is the representative of the testator, since the will expressly provides that the money shall be paid to his estate. There may possibly be cases where devisees, legatees or heirs can enforce a lien for money due the estate of a testator, but no such case is made by the answer. The general rule is that only the administrator or the executor can enforce such a lien, and to take a case out of this general rule, if that be conceded to be possible, facts constituting the case an exception must be pleaded. *Humphries v. Davis*, 100 Ind. 369; *Williams v. Riley*, 88 Ind. 290; *Begien v. Freeman*, 75 Ind. 398; *Westerfield v. Spencer*, 61 Ind. 339; *Ferguson v. Barnes*, 58 Ind. 169.

We know of no rule that will permit heirs to enforce a lien where there is an executor, unless there is some allegation showing a neglect of duty on the part of the executor. Granting that the heirs may enforce a lien where the executor

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neglects or refuses to do his duty, they must, at least, show such neglect or refusal. We do not, however, assert that such an allegation would be sufficient, for it is enough to here declare that without such an allegation the heirs or devisees certainly have no such right. The answer before us does not contain this, or any similar allegation. It does not, indeed, aver that the defendants are the heirs, legatees or devisees of Conrad Crossley. So far as we can know from the record they are strangers. The complaint does not show what relation, if any, the defendants bore to the testator; on the contrary, it avers, as we have seen, that the plaintiff is the owner in fee of the land, and that they have neither title nor interest in the land nor any lien upon it.

If the will creates a lien on the land in favor of the estate of the testator, then it is evident that the third reply is good, irrespective of the allegations concerning the settlement with the widow as the residuary legatee, for it shows that there was a representative of the testator's estate, and if there was an executor, he was the proper party to enforce the lien. If he failed in his duty, he might have been removed; or if he had been discharged, an administrator *de bonis non* might have been appointed. In truth, the answer is bad, if it be assumed that the will creates a lien, and a bad reply is good enough for a bad answer.

What we have said fully disposes of the questions arising on the cross-complaint and the answers to it, for the cross-complaint proceeds on the theory that the provisions of the will create a lien, and the relief sought is that the lien be enforced against the land. It is a settled rule that a pleading must be good on the theory on which it assumes to proceed, or it will not be good at all. *Mescall v. Tully*, 91 Ind. 96, and cases cited; *First Nat'l Bank v. Root*, 107 Ind. 224; *Lane v. Schlemmer*, 114 Ind. 296.

There is, however, another phase of the case which requires consideration. The appellants' counsel say: "Under item 3 of the will Corydon W. Crossley took a conditional fee

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in the real estate deeded to him, dependent upon his paying to the estate of Conrad Crossley \$1,000 within ten years from the time of probating the will, and that sum was a charge and lien upon the real estate to be enforced against Corydon W. Crossley or any other person claiming title under him; that Corydon W. Crossley could discharge the condition of the bequest only by the payment of the \$1,000 to the estate of Conrad Crossley; that as Corydon Crossley could only acquire title to the real estate under the will by complying with its conditions, his grantees, immediate or remote, were purchasers with notice, and took the land subject to the charge thereon, which can be enforced as a lien against the land at any time." This outlines the theory of the appellants, and it is the theory developed in their argument. By this theory they are bound, since parties are held to the theories they adopt, and the court is only required to pass upon such points as are made in argument. *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544 (564); *Carver v. Carver*, 97 Ind. 497 (516).

Deciding, as we must and as we do, that the appellants are held to the theory constructed and presented by them, we must hold that, as that theory is that the will created a lien on the land, we can not with propriety reject that theory and advance one of our own, in order to reverse the judgment. We are, therefore, certainly not bound to inquire whether the will created an estate upon condition, which might be defeated by the failure to perform the condition, and this question we are not compelled to decide.

If we should, however, assume that the question is presented whether the devise was purely a conditional one, and should also assume that the estate was upon condition, still, we do not perceive how the appellants would be benefited. A condition once performed is gone forever, and if the money was once paid the condition perished. But more than this: "Conditions are reserved only to the grantor and his heirs. They can not be reserved for the benefit of third persons. As

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a general rule, therefore, only the grantor and his heirs have a right to enter upon condition broken, and they lose their rights, if they should convey away the reversion in them." Tiedeman Real Prop., section 277. To make the pleadings of the appellants good, it would, therefore, be necessary to add to them very material allegations, for they should show the heirship of the parties and that they still owned the reversion. If there is a conditional estate, then the condition is subsequent and not precedent, and the devisee had a right to convey subject to the condition, and the estate could be defeated only at the election of the parties entitled to enter. Tiedeman Real Prop., sections 271, 277.

It would be necessary, even upon the hypothesis that the will created an estate upon condition, to show that the appellants had a right to defeat the estate, but this they do not do; on the contrary, they do not meet the allegation in the complaint that the appellee owns the fee, for all that they aver may be true and still the appellee have a right to quiet his title as against them. It is, of course, not possible for him to quiet his title as against persons not parties to the action, but he may, under the pleadings, quiet it as against the appellants, since, for anything that appears, they have no title at all and the appellee has the fee.

The view we have taken renders it unnecessary for us to decide whether the appellee's counsel are right or wrong in asserting that "The testator simply desired to state that his son owed him \$2,000, and that it was to be taken into account in the settlement with him." We have not discussed objections made by appellee's counsel to the assignment of errors, and to the answer as being only a partial answer when it purports to be a complete one; nor have we discussed their point that the answer and cross-complaint are bad because they are joint, and the only right at all shown in the pleadings is not a joint right possessed by all the pleaders, although these objections are not only plausible but forcible.

We incline to the opinion that the appellee's contention

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that all the evidence is not in the record should be sustained. There is no statement upon this point authenticated by the judge, as the law requires, nor is the evidence incorporated in a bill of exceptions. *Colt v. McConnell*, 116 Ind. 249; *Wagoner v. Wilson*, 108 Ind. 210.

In *McCormick, etc., Co. v. Gray*, 114 Ind. 340, the evidence was incorporated in the bill of exceptions. But conceding, although not deciding, that the evidence is properly in the record, the judgment must be affirmed upon the merits. Conceding still further, that the will created an estate upon condition subsequent, and that the appellants are the heirs of Conrad Crossley, the judgment is right, because there are no facts proved showing a proper exercise of the right of re-entry (supposing such a right to exist), and courts will not enforce a forfeiture where such facts are absent.

Payment to the widow might, under the will, have been proper. If it was proper, and the executor did make it, then against the heirs (however it might be as to creditors), and in favor of a *bona fide* purchaser, the payment extinguished the condition, and a condition once gone is gone forever. If the executor erred in making the payment, it is doubtful if, as in favor of the heirs and against a *bona fide* purchaser, the estate could be forfeited.

The entire will is in evidence, and one item of it makes the widow the residuary legatee of all the personal property, and a settlement with her as such residuary legatee, evidenced by her acquittance reciting in full what Corydon W. Crossley had paid and had done, protects an innocent purchaser who bought in good faith, relying upon her acquittance, without notice and for full value, and such a purchaser is the appellee. Even if Corydon W. Crossley had been guilty of some wrong, the innocent purchaser should not suffer, since it was the residuary legatee who put it in his power to do the wrong. *Quick v. Milligan*, 108 Ind. 419; *Lucas v. Owens*, 113 Ind. 521.

We do not, however, mean to say that the evidence proves

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that he did do wrong; on the contrary, we think that the evidence shows that he was not guilty of any wrong invalidating the settlement or acquittance. If he made a satisfactory settlement with the widow, that will protect *bona fide* purchasers. It is, indeed, doubtful whether the heirs could in any event disturb that settlement, for it seems probable that if wrong was done, then their remedy would be on the bond.

Courts do not favor the forfeiture of estates for a breach of a condition subsequent, but adjudge a forfeiture with reluctance, and only in clear cases, and, surely, this is not such a case.

What we have said in discussing the pleadings shows that there is no lien which the appellants can enforce. In addition to what has been said, we may properly say that payment to the residuary legatee, or a settlement with her, extinguished the lien as against a good-faith purchaser.

Judgment affirmed.

Filed Jan. 31, 1889.

No. 13,392.

BILLS v. THE CITY OF GOSHEN.

MUNICIPAL CORPORATION.—Ordinance.—License Fees.—An ordinance in reference to the licensing of a place of amusement is invalid if a fixed and definite license fee is not named therein, which all persons engaged in like business must pay, and if it does not state the time of the duration of the license to be issued.

SAME.—Defective Ordinance.—How Cured.—A defective ordinance can not be remedied on motion of a member of the common council. If the defects can be supplied by the passage of another ordinance, such supplemental ordinance must be published before it can be effective.

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117	221
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117	221
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117	221
145	490
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117	221
165	269
165	305
117	221
166	76

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SAME.—Penalty.—A provision in an ordinance, fixing the penalty at a maximum amount, is valid. The court or jury trying the cause may fix the penalty within the bounds prescribed, with the right to vary in amount, owing to the gravity of the offence.

From the Elkhart Circuit Court.

H. C. Dodge, R. M. Johnson and E. G. Herr, for appellant.

I. A. Simmons, J. H. Baker, F. E. Baker and J. H. Defrees, for appellee.

OLDS, J.—On the 19th day of January, 1885, the common council of the city of Goshen passed the following ordinance :

“ORDINANCE No. 55.

“In relation to licensing shows and other amusements.

“SECTION 1. It shall not be lawful for any person to own, conduct or manage for gain, within the city, any theater, circus, caravan, roller skating-rink, or other exhibition, show or amusement, or exhibit any natural or artificial curiosities, or panorama or other show or device of any kind, or give any concert or other musical entertainment without a license: *Provided*, That for musical parties or concerts, and exhibitions of paintings and statuary, given or made by citizens of this city, no license shall be required; and also lectures on historical, scientific, benevolent or literary subjects, and the apparatus for the elucidation of the same, and the specimens of fine art, shall be deemed within this proviso.

“SEC. 2. License shall be granted by the mayor upon written application of any one, for any of the purposes aforesaid, upon the payment into the city treasury of such sum of money as the mayor or common council shall determine in each particular case: *Provided*, That for a circus or animal show or caravan, the license shall not be granted for a less sum than ten dollars.

“SEC. 3. Any person that shall violate any of these provisions of this ordinance, or who shall refuse or fail to comply with any or either of the requirements thereof, shall be fined in any sum not exceeding one hundred dollars and costs.

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"SEC. 4. This ordinance shall take effect and be in force from and after its passage and publication for two consecutive weeks in the Goshen Times."

On the 9th day of February, 1885, the following further proceedings were had by the common council: "Councilman Drake moved that the license fee for skating-rinks be fixed at one hundred and fifty dollars per annum, and that the manager of the rink be required to pay that amount, his license to date from Monday, February 16th, 1885. The motion was seconded by Councilman Scott, and carried. Councilman Drake moved that the manager of the rink be required to pay his license in two instalments, semi-annually in advance, which motion was carried."

On the 5th day of March, 1886, this action was commenced before one E. L. Billings, who was the then acting mayor of the city, charging appellant with a violation of sections 1 and 3 of this ordinance. A conviction was had and an appeal taken to the circuit court, and there an amended complaint was filed, setting out in such amended complaint the ordinance and the action taken by the common council as hereinbefore set out, and alleging that the appellant was engaged in said city in managing, running and operating a roller skating-rink for hire and gain on, and prior to, the 16th day of February, 1885; that the city offered to him a license duly issued and demanded of him the first payment; that appellant refused to pay and accept the license, and charging that he violated sections 1 and 3 of the ordinance, on the 16th day of February, 1885, in that he did then and there unlawfully for gain own, conduct, operate and manage a roller skating-rink without having first obtained a license.

Appellant filed a demurrer to the complaint, for the cause that the complaint did not state facts sufficient to constitute a cause of action, which demurrer was overruled by the court, to which ruling appellant at the time excepted.

Appellant then filed an answer, to which answer appellee

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demurred. The demurrer was sustained and appellant excepted.

Errors are assigned on the ruling of the court on the demurrers to the complaint and answer.

The question presented and argued is as to the validity of the ordinance.

Section 3099, R. S. 1881, declares: "All by-laws and ordinances shall, within a reasonable time after their passage, be recorded in a book kept for that purpose, and shall be signed by the presiding officer of the city, and attested by the clerk."

Section 3106, defining the powers of the common council, provides that they shall have the management and control of the finances of the city, and of all property, real and personal, belonging thereto; and shall have the additional powers therein permitted, and may make and publish by-laws and ordinances necessary to enforce the same. The common council shall have the power to enforce ordinances.

The fourteenth and fifteenth subdivisions of the section are as follows:

"*Fourteenth.* To regulate and restrain all tables, alleys, machines, devices, or places of any kind for sports or games, kept for hire or pay, or to prohibit the use of the same, as aforesaid, if deemed expedient, without a license being first obtained therefor; and, if deemed necessary to preserve peace, good order, and morality, to prohibit the use of the same, as aforesaid, by the infliction of such penalties as this act will permit, to be provided for by ordinance.

"*Fifteenth.* To regulate and restrain all theatrical and other exhibitions and public shows for which money is demanded or received; and, if deemed expedient, to prohibit the same without a license having been first obtained therefor."

It is by virtue of these sections of the statute that the city is given whatever power and right she has to regulate games

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and sports, and prohibit the same without license, and to provide for licensing the same.

Section 3100 declares: "Every by-law imposing a penalty or forfeiture for the violation thereof, shall, before the same shall take effect, be published two weeks consecutively in some newspaper printed in the city."

The words "ordinance" and "by-law" are used interchangeably in the statute, and they are synonymous. Horr & Bemis Municipal Police Ordinances, section 1, defining ordinance, says: "Municipal ordinances are laws passed by the governing body of a municipal corporation for the regulation of the affairs of the corporation. The term *ordinance* is now the usual denomination of such acts, although in England and in some of the States the technically more correct term *by-law* or *bye-law* is in common and approved use. The main feature of such enactments is their local as distinguished from the general applicability of the State laws; hence the word *law*, with the prefix *by* or *bye*, should in strictness be preferred to the word *ordinance*."

By the authority vested by statute the city passed the ordinance in question in this case, prohibiting persons from doing the things therein designated within the city limits, providing for a license permitting them to engage in such pursuits as named in the ordinance, and fixing a penalty for the violation of such ordinance. If the ordinance was valid, the violation of the ordinance would consist in engaging in such pursuits, and in this instance the violation would have consisted in owning, conducting or managing a roller skating-rink without having procured a license so to do.

It was evidently not the intention of the common council—the law-makers of the city—to entirely prohibit the owning, conducting or managing of such roller skating-rink, but only to prevent the same being done without a license. Therefore, if the ordinance does not provide for licensing the same, then the ordinance is void, and there can be no recovery.

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ery for conducting and managing a roller skating-rink. Horr & Bemis' work on Municipal Police Ordinances, section 13, says: "The extent to which discretion may be given to the ministerial officers in the granting of licenses is in dispute. Express power in the charter will warrant such delegation. The authorities differ widely, but the proper conclusion seems to be that as little latitude should be given to the ministerial officer as possible. In exercising a power to license certain occupations, the council should by its ordinance prescribe the exact occupation to be licensed, the amount of the fee to be charged, either uniformly or by reasonable classification, the condition upon which the license may be issued, and the duration of its validity," etc. Section 263, same authority, says: "As has already been stated, no discretionary powers should be vested in the officers whose duty it is to execute the provisions of ordinances, and the rule is entirely applicable to this class of ordinances. The ordinance itself should specify every condition of the license, and the officer should be merely intrusted with the duty of issuing licenses to all who comply with the prescribed conditions."

This is undoubtedly the true theory and the correct law governing ordinances for license. The statute provides that the common council may, by ordinance, license, and may prohibit certain pursuits without first being licensed, and it further provides that ordinances prescribing penalties for the violation of the same shall be published. It is, further, a well settled principle that cities can not discriminate between citizens engaged in the same business; that if they license they must license all alike. See *Graffy v. City of Rushville*, 107 Ind. 502; *Benjamin v. Webster*, 100 Ind. 15.

It is, therefore, material to the validity of an ordinance that a fixed and definite license fee should be named therein, which all persons engaged in like business shall pay. Section 2 of the ordinance in question in this case is defective in that it does not fix any amount to be paid as a

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license fee, but leaves it open for the common council to fix the fee to be charged in each particular case; besides it seeks to delegate the power to fix the fee to be charged in each case to the mayor of the city, which there was no right to do. It is also defective in that it does not state the time of the duration and validity of the license to be issued. As we have stated, this ordinance provides a penalty for the violation of the ordinance, and the violation consists in the doing of the things specified, without first having procured a license. The statute requires such ordinances to be published, and the material matters omitted from that ordinance are such as ought to be published to advise the citizens what they are required to do to comply with the city law. By the reading of this ordinance it could not be determined what license fee must be paid, nor the duration of the validity of the license. It follows as a conclusion that, if the defects could be supplied by the passage of another ordinance by the council (which must be conceded to be exceedingly doubtful), such supplemental ordinance must be published before it could be effective.

The ordinance as passed was defective and void.

The statute empowered the city to regulate and restrain certain things named therein without a license being first obtained therefor; but in granting the power it says: "The common council shall have the power to enforce ordinances, to regulate and restrain," etc. The power was given to be exercised in a certain way, *i. e.*, by ordinance, by a by-law, and the statute also declares how an ordinance or a by-law shall be passed; it requires it to be signed by the presiding officer and attested by the city clerk and recorded, and having vested the power in the city to be exercised in a certain way, it can not be enforced otherwise than as provided by the statute.

The attempt to afterwards supply the defect in the ordinance by a motion made by one of the common council, seconded by another, and put to a vote and carried, certainly can not

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be held to be a compliance with the statute we have referred to, or a proper way to remedy a defective ordinance.

There are other questions presented as to the phraseology of the ordinance, which we do not deem it necessary to consider. The ordinance being invalid for the reasons stated, there can be no action based upon it, and if another ordinance should be enacted, the objection would no doubt be avoided. There is, however, one further question which should receive consideration, and that is as to the definiteness of the penalty. Numerous cases have been passed upon by this court involving the validity of ordinances with like provisions as to the penalty, and they have been held valid, yet we have not been able to find where the objection here urged has been presented and decided, neither have counsel in their briefs called our attention to any.

It is contended by counsel for appellant that as section 3155, R. S. 1881, provides that the common council may enforce the observance of all by-laws and ordinances by enacting penalties for their violation, not exceeding one hundred dollars for any offence, it is incumbent on the council to fix a sum definite as a penalty, and that they can not fix a maximum amount and leave it to the discretion of the court to assess a penalty in any amount which seems to the court proper, not exceeding such sum, as under this ordinance the penalty assessed might be any sum not exceeding one hundred dollars, and there are authorities holding to the theory of the counsel. *Horr & Bemis Municipal Police Ordinances*, section 79, says: "The better rule seems to be that it is definite enough to set limits to the amount of the fine that may lawfully be exacted, or the length of the imprisonment that may be inflicted." See, also, *McConvill v. Jersey City*, 39 N. J. 38, and *Toledo, etc., R. W. Co. v. Deacon*, 63 Ill. 91. We think this is the proper rule to adopt, and it is in harmony with our system of jurisprudence to allow the court or jury trying the cause to fix the penalty within the bounds prescribed, with the right to vary in amount, owing to the

 Jones v. Snyder.

gravity of the offence, and is not objectionable to any provisions of the Constitution.

The right to pass the ordinance is vested in the common council, and the right to enforce it and assess the penalty is vested in the courts. The ordinance is not objectionable on that account.

For the reasons we have stated, the amended complaint was bad, and the court below erred in overruling the demurrer thereto.

Judgment reversed, with directions to sustain the demurrer to the complaint, and for further proceedings not inconsistent with this opinion.

MITCHELL, J., took no part in the consideration of this case.

Filed Feb. 1, 1889.

117	280
121	306
117	229
159	619

No. 13,446.

JONES v. SNYDER.

FRAUDULENT CONVEYANCE.—Husband and Wife.—Implied Trust.—Consideration.—Where the consideration for property which a debtor causes to be conveyed to his wife is paid by the wife, or with money which her husband owes her, no trust is implied in favor of the husband's creditors, under section 2975, R. S. 1881.

SAME.—Evidence.—Letter.—Quieting Title.—A letter written by the husband three years after the conveyance to the wife, enumerating certain debts, the date of which is not given, and proposing to mortgage property standing in the wife's name, is not competent evidence against the wife in an action by her against the husband's creditors to quiet title.

EVIDENCE.—Real Estate.—Value.—One who has examined property and inquired of qualified persons as to its value, may testify as to its value, although not a resident of the city where it is situate.

From the Tippecanoe Superior Court.

Jones v. Snyder.

B. W. Langdon, T. F. Gaylord and W. F. Severson, for appellant.

W. D. Wallace, for appellee.

MITCHELL, J.—This was an action by Irene Snyder against Mark Jones, in which the plaintiff alleged in her complaint that she was the owner in fee simple of certain described real estate in Tippecanoe county, and that the defendant, Jones, set up a claim of title thereto. She asked to have her title quieted by a decree of the court. After hearing the evidence the court gave a decree according to the prayer of the complaint.

There is no dispute but that the legal title to the real estate in controversy is in Mrs. Snyder. The appellant's claim is, that the consideration for the conveyance to her was paid by her husband, John K. Snyder, and that the latter caused the conveyance to be made to his wife in fraud of the rights of his creditors, and that the appellant was at the time a creditor of John K. Snyder.

The contention is, that the plaintiff became a trustee by implication of law, under the provisions of section 2975, R. S. 1881, which enacts, in substance, that every conveyance to one person where the consideration is paid by another shall be presumed fraudulent as against the creditors of the person paying the consideration; and where a fraudulent intent is not disproved, a trust shall in all cases result in favor of creditors.

The application of this statute requires that a debtor, without a sufficient amount of other property out of which his debts might have been collected, shall have paid the consideration for property which he caused to be conveyed to another to defraud his creditors. *Eiler v. Crull*, 112 Ind. 318.

The obstacle in the way of the appellant's theory is, that it was a disputed question of fact, whether or not the consideration for the property was paid by the plaintiff's husband, or whether it had not, in contemplation of law, been paid by her,

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and, upon the evidence, the court may well have found that she paid the consideration. In that event there was no room for the application of the above mentioned statute.

It may be conceded that certain property, the title to which was at the time in John K. Snyder, was exchanged for Chicago real estate, the title to which was taken in the name of the plaintiff, and that the Chicago property was afterwards exchanged, indirectly, for the lot in controversy; but there was evidence tending to show that in the division of her father's estate, Mrs. Snyder had received property substantially equal in value to that in question, and that the property so received had been appropriated by her husband. There was evidence tending to show that the latter agreed to make or keep good to his wife the amount of property received by her from her father's estate, and that he caused the several conveyances to be made to her in execution of that agreement.

If this was true, as the court must have believed it was, then it can not with propriety be said that the consideration of the property conveyed to Mrs. Snyder was paid by her husband, within the meaning of section 2975. Creditors can not invoke the aid of the statute to prevent a husband from restoring to his wife that which in equity and good conscience he has no right to withhold. *Taylor v. Duesterberg*, 109 Ind. 165; *Hoes v. Boyer*, 108 Ind. 494; *Proctor v. Cole*, 104 Ind. 373.

It was also a disputed question whether or not John K. Snyder was insolvent at the time he caused the conveyances to his wife to be made.

A letter written by Snyder some three years and more after the conveyances in question were made, in which he enumerates certain debts owing by him, and in which he proposes to mortgage certain Chicago lots, the title to which stood in the name of his wife, was offered in evidence by the appellant and excluded. This ruling was very clearly right. It did not appear, nor was it proposed to show, that the debts

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spoken of in the letter were subsisting claims against Snyder at the time the conveyances complained of were made, or that they had not been contracted since.

The letter would hence have cast no light upon the financial condition of the writer at any time material to the inquiry before the court. As respects the proposition to mortgage the Chicago property, the letter was clearly incompetent as evidence against the plaintiff, who was neither a party to the letter, nor shown to have had any knowledge of its existence.

There was no valid objection to the competency of Berryhill to testify concerning the value of the property in relation to which he was inquired of. Although not a resident of Chicago, he had personally examined the property, and made inquiry of qualified persons concerning its value with a view of effecting a sale, and while his testimony may not have been of much weight, it was nevertheless competent.

We find no error in the record.

The judgment is therefore affirmed, with costs.

Filed Feb. 1, 1889.

 No. 13,518.

SCOTT v. DAVIS ET AL.

FRAUDULENT CONVEYANCE.—When Grantee Will Hold.—A purchaser of land who pays a consideration for it will hold it as against the grantor's creditors, unless it is affirmatively shown that he participated in the grantor's fraud or had knowledge of his fraudulent intention.

SAME.—Consideration.—Agreement to Support Parents.—A conveyance is not fraudulent because the purchaser, in addition to the consideration paid in money and notes to a third person, agrees to support his father and mother during their lifetime.

SAME.—Secret Trust.—Such an agreement by the grantee does not constitute

 117 232
 143 677

 117 232
 154 89

Scott v. Davis *et al.*

a secret trust invalidating the conveyance, if it is otherwise supported by an adequate consideration, and the grantee is not guilty of fraud.

From the Montgomery Circuit Court.

J. F. Harney, for appellant.

L. J. Coppage, for appellees.

ELLIOTT, C. J.—A purchaser who buys land and pays a consideration for it will hold the land against the creditors of the vendor, unless the creditors affirmatively show that the purchaser had notice of the intention of the vendor to defraud his creditors, or that he participated in his grantor's fraud. It is not enough to show fraud on the part of the vendor, where the purchaser is not a mere volunteer, but pays a consideration for the land. To set aside the conveyance as fraudulent, much more must be shown. *Jarvis v. Banta*, 83 Ind. 528; *First Nat'l Bank v. Carter*, 89 Ind. 317; *Hogan v. Robinson*, 94 Ind. 138; *Pennington v. Flock*, 93 Ind. 378; *Seager v. Aughe*, 97 Ind. 285; *Plunkett v. Plunkett*, 114 Ind. 484.

There was in fact no evidence in this case, upon which the court was bound to act, showing a fraudulent intent on the part of the vendor, and certainly none at all tending to show that the purchaser was a participant in the fraud, or that he had guilty knowledge.

A conveyance is not fraudulent because the purchaser, in addition to the consideration paid in money and notes to third person, agrees to support his father and mother during their lifetime; nor does such an agreement constitute a secret trust invalidating the conveyance, in cases where it is otherwise supported by an adequate consideration, and the grantee is not guilty of fraud.

Judgment affirmed.

Filed Feb. 1, 1889.

The Grand Rapids and Indiana Railroad Company v. Ellison.

No. 13,009.

THE GRAND RAPIDS AND INDIANA RAILROAD COMPANY v.
ELLISON.

PLEADING.—*Amended Complaint.*—*Motion to Reject.*—*Discretion of Trial Court.*

—Where it is not shown that the trial court abused its discretion in permitting an amended complaint to be filed, no available error can be predicated on its refusal to strike it out.

VERDICT.—*General and Special.*—*Reconciliation.*—If there is any reasonable hypothesis on which the general verdict and a special finding can be reconciled, judgment must follow the general verdict.

RAILROAD.—*Negligence.*—*Passenger.*—*Warning Engineer of Danger.*—A passenger who sees a train on an intersecting road approaching a crossing, is not guilty of contributory negligence because he fails to pull the bell-rope and warn the engineer of the danger.

SAME.—*Incompetent Employee.*—*Knowledge of.*—In an action by a passenger to recover for injuries received in an accident caused by the negligence of a watchman in the employ of the defendant, it is no defence that the defendant had no knowledge of the watchman's incompetency until after the accident.

SAME.—*Carrier and Passenger.*—*Degree of Care.*—A passenger is entitled to a safe transit, and the carrier is bound to the highest degree of reasonable care.

SAME.—*Fireman.*—*Absence from Post.*—It is the duty of a fireman to be at his post of duty when his train is in motion, and where, by his neglect, an accident happens which could otherwise have been averted, the company is liable.

SAME.—*Intersecting Road.*—*Stopping Train.*—It is the duty of an engineer, when approaching the crossing of an intersecting railroad, to stop his engine until it can be ascertained that the crossing is clear.

SAME.—*Line of Duty.*—*Evidence.*—*Opinion.*—Whether an engineer was acting in the line of his duty at a given time is a question to be determined by the jury from the facts, and opinions of witnesses upon a supposable state of facts are not admissible.

SAME.—*Prudence of Employees.*—A railroad company is not relieved of liability because its employees acted with reasonable prudence after discovering a danger which their negligence contributed in bringing about.

From the Allen Superior Court.

A. A. Chapin and W. S. O'Rourke, for appellant.

L. M. Ninde, J. Morris and J. M. Barrett, for appellee.

117 334
121 380
123 409
123 317
123 461
117 334
124 179
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126 394
127 59
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137 644
117 234
148 276
148 377

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BERKSHIRE, J.—The appellee brought this action against the appellant to recover damages for injuries to his person, which he avers he sustained, without fault on his part, while a passenger on one of the appellant's trains, because of the negligence of its servants and employees.

The appellant answered the complaint by filing a general denial.

The case was tried by a jury and a general verdict returned for the plaintiff, assessing his damages at \$500. The jury also returned into court with their general verdict, certain interrogatories, which had been submitted to them, and their answers to the said interrogatories.

The appellant moved the court for judgment on the answers to the interrogatories, notwithstanding the general verdict; this motion the court overruled. The appellant then moved for a new trial, and this motion was overruled, and judgment rendered on the general verdict for the appellee for the damages assessed and for costs.

The errors assigned by the appellant are: (1) Error of the court in overruling its motion to strike the amended complaint from the files. (2) Error of the court in overruling the demurrer to the amended complaint. (3) Error of the court in overruling the motion for judgment, notwithstanding the general verdict. (4) Error of the court in overruling the motion for a new trial.

Granting to the appellee permission to file an amended complaint was within the discretionary powers of the court, and, as the record shows no abuse of discretion, there is no available error because of the action of the court in this regard. Section 391, R. S. 1881; *Durham v. Fechheimer*, 67 Ind. 35; *Child v. Swain*, 69 Ind. 230; *Town of Martinsville v. Shirley*, 84 Ind. 546; *Dewey v. State, ex rel.*, 91 Ind. 173.

The second assigned error, that the court erred in overruling the demurrer to the complaint, is not discussed by counsel for appellant, and is, therefore, waived.

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The third alleged error, the overruling of the motion for judgment *non obstante veredicto*, is earnestly discussed.

In this State it is well settled, that if there is any reasonable hypothesis whereby the general verdict and the special finding can be reconciled, judgment must follow the general verdict. *Redelsheimer v. Miller*, 107 Ind. 485; *Cincinnati, etc., R. R. Co. v. Clifford*, 113 Ind. 460.

The answer to interrogatory 21 is in conflict with the answer to interrogatory 36. The former is, that the engineer of the New York, Chicago & St. Louis R. R. Co. did not wickedly and recklessly so run his engine as to cause the collision. The latter answer is, that the wicked and reckless conduct of the said engineer was the primary and proximate cause of the collision.

The one neutralizes the other, but if this were not so, the latter answer states a mere legal conclusion.

In determining whether the answers which the jury return to the interrogatories are to control the general verdict, they must be treated as a special verdict, and therefore the jury must return the facts, from which the court will draw the conclusions of law.

The answers to interrogatories 39 and 40 find that the appellee saw the engine of the N. Y., C. & St. L. R. R. Co. approaching the crossing; that thereafter he could have pulled the bell-rope and signaled appellant's engineer of the approaching danger, and, had he done this, the engineer would have received warning in time to have stopped the train and avoided the accident.

The appellee was not bound to do this. As a passenger it was no part of his province to interfere in any way in the management of the train. Counsel for the appellant cite us to no authority in support of their contention to the contrary.

The answers to interrogatories 5, 7 and 8 find that by virtue of a contract between the N. Y., C. & St. L. R. R. Co. and the appellant the former employed a watchman to

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manage the signals and regulate the passage of engines and trains over the crossing where the accident occurred; that if the signals and rules adopted by said companies had been observed and obeyed, the accident would not have happened; that the N. Y., C. & St. L. R. R. Co. paid the watchman.

The answer to interrogatory 6 is, that before the accident the officers and managers of the appellant company had no knowledge of the incompetency of the watchman.

If the watchman was incompetent and his incompetence contributed to the injury, it is wholly immaterial as to whether the appellant's officers and managers were or were not informed thereof. He was an employee of the appellant, and it was responsible for his negligence, whether he was or was not a competent watchman.

The answers to interrogatories 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 and 22 only go to show that the engineer of the N. Y., C. & St. L. R. R. Co. was guilty of negligence; they do not exclude the idea of negligence, on the part of the appellant's employees.

The answers to interrogatories 1 and 2 find that the appellee was a passenger on a train of cars owned and being run by the appellants, on the morning of December 24th, 1883, and while being thus carried the accident complained of happened, at the crossing of the N. Y., C. & St. L. R. R. Co.'s railroad and the railroad of the appellant.

The appellee, as a passenger, was entitled to a safe transit, and the appellant was bound to the highest degree of reasonable care. *Gaynor v. Old Colony, etc., R. W. Co.*, 100 Mass. 208; *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264; *Bedford, etc., R. R. Co. v. Rainbolt*, 99 Ind. 551; *Wood Railway Law*, p. 1076, note 2; *Pittsburgh, etc., R. R. Co. v. Williams*, 74 Ind. 462.

The answers to interrogatories 3, 4, 23, 24, 25, 26, 28, 30, 31, 32, 33, 34, 35 and 38, find that there had been erected, at the crossing where the accident occurred, some years before, a target, upon the top of which were suspended red and white

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balls, to be used as signals in regulating the passage of trains; that it had been mutually agreed between the two companies that when a white ball was displayed on said target, the appellant's engines and trains had the exclusive right to pass over said crossing; that the engineer of the appellant's train brought his engine and train to a full stop 700 feet south of the said crossing before attempting to pass over it; that, after bringing his train to a full stop, he rang the bell and sounded the whistle of his engine, and obtained the white ball signal for his train to pass over the crossing before again putting his train in motion; that, after receiving the signal, the appellant's engine and train had the exclusive right of passage over said crossing to and including the time at which the accident occurred; that, after advancing with his train a distance of 200 feet, the engineer of appellant's train stepped over to the west side of his engine and looked out on the track of the N. Y., C. & St. L. R. R. Co.'s railroad to ascertain if there was any danger from that direction; that, on the east side of the appellant's railroad, approaching from the south, the view from the appellant's engine was obstructed to a point within 250 feet of the crossing; that the side-tracks, engine-house and Fort Wayne station of the N. Y., C. & St. L. R. R. Co. were east, and within one mile of said crossing; that more care was required to avoid approaching engines that might be on that company's railroad from the east than from the west side; that for the safe and proper management of his train, it was necessary that the appellant's engineer should remain on the east side of his engine as he approached the crossing; that it was necessary for the appellant's engineer, as he approached the crossing with his train, to look to the east for approaching trains on the N. Y., C. & St. L. R. R. Co.'s railroad; that, when standing at his post on the east side of his engine, the view of the appellant's engineer of the railroad of the N. Y., C. & St. L. R. R. Co. westward was obstructed until his train arrived at the crossing; that the appellant's engineer had no information that

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the engine colliding with his train was nearing the crossing; that the engineer and servants of the appellant obeyed the rules and signals adopted for the passage of engines and trains over the said crossing.

These facts are not inconsistent with negligence on the part of the employees of the appellant, contributing directly to the accident.

It is a fact well known that all engines hauling passenger and freight trains carry a fireman as well as an engineer, and when the engine is in motion the post of the fireman is on the left side of the cab, and that of the engineer on the right.

If there was a fireman on the appellant's engine on the morning of the accident, it was his duty when his train was in motion, and especially so when nearing a railroad crossing, to be at his post and on the lookout.

It is evident from the answers to the interrogatories that, had the fireman been at his post in the performance of duty, he could and would have observed the approaching engine on the other road, and informed the engineer in time for him to have stopped the train and prevented the accident.

This state of facts we must assume in considering this motion. But this is not all.

The answers to the interrogatories show that the appellant's engineer stopped his engine 700 feet from the crossing, and then started on, not stopping again until the accident occurred.

This was not only negligence, but the grossest kind of negligence. It was the duty of the engineer to move his train to a point near the crossing and bring it to a full stop, and then ascertain whether there was a train on the other railroad in sight or approaching said crossing; if not, then he had the right to move his train across, otherwise it was his duty to hold his train until he could pass over in safety. Section 2172, R. S. 1881.

Had the engineer done his duty in this particular, it is very clear the accident would not have happened.

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The speed at which the appellant's train approached the crossing is not given in the answers of the jury. For the purposes of this motion, we may presume that its speed was at least the ordinary speed at which passenger trains are moved. But, without any presumption, the failure of the engineer to stop his engine near the crossing and to inform himself whether or not there were approaching trains or engines on the other railroad, and in the vicinity of the crossing, was gross negligence, contributing directly and proximately to the injury.

The answers to interrogatories twenty-eight and thirty-four seem to be inconsistent.

The answer to twenty-eight is, that on the west side of the appellant's engine, approaching from the south, the view of the other railroad track was obstructed to a point within two hundred and fifty feet of the crossing; the answer to thirty-four is, that the view was obstructed to the crossing.

If the view was obstructed, then there was a greater necessity for stopping the train at the crossing or near thereto before attempting to pass over it.

The answer to the twenty-sixth interrogatory finds that appellant's engineer, when within five hundred feet of the crossing, passed over to the west side of his engine and looked out on the railroad of the New York, Chicago and St. Louis Railroad Company to see if there was any danger; the answer to interrogatory twenty-seven finds that there was an approaching engine on the other railroad at that very time.

A very significant circumstance in this connection is, that the jury do not find whether the engineer saw the approaching engine or not.

The court below was clearly right in overruling the motion for a judgment upon the answers to the interrogatories.

This leads us to the error assigned because of the overruling of the appellant's motion for a new trial.

The third reason for a new trial is, that the court refused

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to permit the appellant to ask Patrick O'Rourke, a witness, the following question :

"Mr. O'Rourke, suppose that an engineer in charge of a passenger train stops at a distance of 695 feet from the railroad crossing, where the target crossing is in full view, comes to a full stop, whistles for the signal, obtains the signal which gives him the right to pass over the crossing ; that at that point there is a cut which prevents his seeing any great distance upon either side of the track that he is on ; that he then starts up his engine at the rate of between six and eight miles an hour ; when he gets 200 feet nearer to the crossing he comes out of the cut so that he could see on the west (if he is going north) ; he then steps across to the left-hand side and looks to the west ; he could see four or five hundred feet to the west ; there is no engine in sight approaching the crossing upon the other track ; upon the right-hand side the view is obstructed for 200 feet farther, so that he could not see the track east ; as he steps back to his post on the right-hand side to his throttle valve and apparatus with which he manages his engine, and when he gets 200 feet further he looks to the east to see if there is any danger there, discovers none, and during all this time he keeps the target in full view ; a signal has been given which gives him the right to cross, a watchman being at the target ; he then drives his engine on to the crossing. I would ask you whether, under such circumstances, you would say that an engineer was acting within the line of his duty under such circumstances ? "

This was clearly an improper question, and the court did right in refusing to allow the witness to answer it.

It is sufficient to say that, as to whether the engineer was acting in the line of his duty on the occasion in question, was a question to be determined by the jury from the facts proven, and not from the opinions of witnesses given upon a supposable state of facts.

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The sixth reason for a new trial is the giving of instructions one and two, requested by the appellee.

These instructions are long, and we do not, therefore, set them out in this opinion.

We have carefully examined them and are satisfied that they state the law correctly as to the duties and responsibilities of railroad companies as carriers of passengers.

The court followed the well considered cases in this court of *Pittsburgh, etc., R. R. Co. v. Williams, supra*; *Bedford, etc., R. R. Co. v. Rainbolt, supra*; *Cleveland, etc., R. R. Co. v. Newell, supra*.

We are of the opinion that the instructions were applicable to the case made by the evidence.

The seventh reason for a new trial is, that the court erred in refusing to give instruction three, requested by the appellant. As this instruction is short, we set it out:

"3. If you find that the plaintiff was injured through the negligence of any one or more of the employees of what has been called the Nickel Plate Railroad Company, and that said employee or employees were not in the employment of the defendant nor under its control, and that the defendant's servants had no reasonable cause, under all the circumstances, to anticipate that the said employees of the Nickel Plate Company would be negligent, and that defendant's employees acted reasonably prudent themselves as soon as they became aware of the impending danger to avoid the same, then your verdict should be for the defendant."

This instruction was properly refused. It asks the court to say to the jury that if the appellant's employees were reasonably prudent after they discovered impending danger, the verdict of the jury should be for the appellant, though the negligence of the said employees may have contributed directly to bring about the danger that was impending.

But again, the instruction was not applicable to the case as made by the evidence.

There is a further reason why the judgment should be af-

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firmed. The record shows that substantial justice has been done.

As the foregoing are the only reasons for a new trial discussed by counsel for appellant, we do not notice the others.

We find no error in the record for which the judgment should be reversed.

The judgment is affirmed, with costs.

Filed Feb. 1, 1889.

No. 13,464.

GRUBBS ET AL. v. KING, ASSIGNEE.

PLEADING.—Demurrer.—Sufficiency of.—A demurrer to a complaint, alleging for the reason thereof "that the petition does not state facts sufficient to constitute a good and sufficient petition," does not set forth any statutory cause for demurrer.

VOLUNTARY ASSIGNMENT.—Preferred Creditors.—Deed Void in Part.—Where a deed of assignment purports on its face to convey to the assignee all of the assignor's property, for the benefit of all of his creditors, and certain creditors are preferred therein, the provision as to the preferred creditors is void, but the deed will be upheld as constituting a valid statutory assignment.

From the Adams Circuit Court.

L. C. Devoss, D. D. Heller and P. G. Hooper, for appellants.

J. T. France and J. T. Merryman, for appellee.

COFFEY, J.—This was an action in the court below by the appellee against the appellants for an injunction.

The complaint alleges, substantially, that, on the 18th day of January, 1886, Catherine E. Albers and Peter R. Albers,

117	243
118	550
121	435
117	243
127	500
117	243
134	76
135	249
117	243
161	506
117	243
171	48

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constituting the firm of C. E. Albers & Son, as such firm, made, executed and delivered to appellee a deed of assignment, said assignment being voluntary, for the benefit of their creditors; that appellee, on said day, caused said deed to be duly recorded in the record of deeds in the recorder's office of Adams county, Indiana, and that he was duly qualified as such assignee; that, on the 13th day of April, 1886, the appellants, John W. Grubbs, W. W. Grubbs, William F. Starr and James A. Coffin, recovered a judgment against the said Catherine E. Albers and Peter R. Albers in the circuit court of Adams county, and on the 24th day of April, 1886, sued out an execution on said judgment, and placed the same in the hands of the defendant, Michael McGriff, who is the sheriff of said county; that said sheriff, under the direction of said judgment plaintiffs, through their attorney, is threatening to levy said execution upon the property so conveyed to the appellee by said deed of conveyance. Prayer for an injunction, etc.

To this complaint the appellants filed a demurrer, as follows:

"Come now the defendants above named, and demur to the petition in the above entitled cause, for the reason that the same does not state facts sufficient to constitute a good and sufficient petition."

This demurrer was overruled by the court, and the appellants excepted.

The answers appearing in the record are: *First.* A general denial; and, *Second.* Substantially, that the pretended deed of assignment made by Catherine E. Albers and Peter R. Albers, of the firm of C. E. Albers & Son, and mentioned in plaintiff's complaint, a copy of which said pretended deed is herewith filed and made a part hereof marked exhibit "A," and by virtue of which pretended deed the plaintiff, John King, Jr., claims to be the legally appointed and qualified assignee and trustee of said firm of C. E. Albers & Son, is fraudulent and void as against defendants herein, for the rea-

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son that in said pretended deed of assignment the following creditors are preferred, to wit: Robert D. Patterson and William Pillars, composing the firm of Patterson & Pillars, Jacob S. Hart, the Kekionga Lodge, No. 65, Knights of Pythias, of the city of Decatur, in Indiana, and Philip E. Albers. Wherefore, etc.

The appellee filed a demurrer to this second paragraph of answer, which was sustained by the court, and appellants excepted.

The cause being at issue on the general denial was tried by the court, the trial resulting in the granting of a perpetual injunction against the appellants.

The errors assigned in this court are :

1st. That the court erred in overruling the demurrer to the petition.

2d. That the court erred in sustaining the demurrer to the second paragraph of answer.

3d. The court erred in overruling the motion for a new trial.

It is argued by the appellee that the demurrer to the complaint does not contain any of the statutory causes for demurrer, and that it is not a compliance with the fifth clause of section 339, R. S. 1881. The fifth clause of section 339 is as follows :

“That the complaint does not state facts sufficient to constitute a cause of action.”

In the case of *Gordon v. Swift*, 39 Ind. 212, it was held that a demurrer to an answer, assigning as cause “That said paragraph is not a sufficient defence in law to plaintiff’s complaint,” presented no legal cause or ground of demurrer, citing *Kemp v. Mitchell*, 29 Ind. 163, *Cincinnati, etc., R. R. Co. v. Washburn*, 25 Ind. 259, *Tenbrook v. Brown*, 17 Ind. 410, and *Hicks v. Reigle*, 32 Ind. 360.

In *Thomas v. Goodwine*, 88 Ind. 458, the demurrer was as follows: “Because said defendant’s answer does not state facts sufficient to constitute an answer to plaintiff’s com-

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plaint." It was held not to state any of the statutory causes of demurrer.

In the case of *Pine Civil Tp. v. Huber Mnf'g Co.*, 83 Ind. 121, the demurrer was: "*First.* Because said complaint does not state facts sufficient to constitute a complaint." It was held that such a demurrer presented no question for the consideration of the court.

Following these authorities, we are compelled to hold that the demurrer now under consideration is not sufficient to call in question the sufficiency of the complaint in this case as a cause of action, and that the court below did not err in overruling the same.

The second paragraph of answer above set out is drafted upon the assumption that the deed of assignment under which the appellee claims the property of Albers & Son is void, for the reason that it names certain of the creditors as preferred. This deed is in the record, and it purports to convey to the appellee all the property of C. E. Albers & Son for the benefit of all the creditors of said firm, to be administered under an act of the Legislature concerning insolvent debtors, in force March 5th, 1859. It is apparent from the face of this deed that the parties thereto intended it as a statutory assignment, bringing all the property thereby conveyed under the control of the court, to be administered for the benefit of all the creditors of C. E. Albers & Son.

It does not appear from the face of the deed that there was any actual intent to cheat, hinder or delay creditors, nor is any such intent alleged in the answer.

In the case of *Redpath v. Tutewiler*, 109 Ind. 248, this court, by MITCHELL, J., states the law upon this subject thus: "It is only where the deed of assignment contains directions which are actually hostile to, and in disregard of, some express provision of the assignment law, or where it is apparent therefrom that it was not the intent of the assignor to bring his estate under the control of the court, and secure its distribution according to the law regulating vol-

Walter v. Walter.

untary assignments, that the deed will be held fraudulent and void *per se* under section 2662, R. S. 1881."

Where a deed of this character contains a provision preferring one creditor over another, such provision will be held void, but the deed, as constituting a valid statutory assignment, will be upheld. *Henderson v. Pierce*, 108 Ind. 462.

It follows from what we have said that the court did not err in sustaining the demurrer of the appellee to the second paragraph of the answer of the appellants.

The only matter urged by counsel for appellants under the third assignment of error is, that the court below erred in permitting the appellee to read the deed of assignment in evidence on the trial. We think the deed, under the issues made, was competent evidence for the appellee.

We find no error in the record for which the judgment of the court below should be reversed.

Judgment affirmed.

Filed Feb. 2, 1889.

No. 13,249.

WALTER v. WALTER.

HUSBAND AND WIFE.—Desertion.—Complaint for Support.—For a complaint by a wife against her deserting husband for support, under sections 5132 and 5133, R. R. 1881, which is held sufficient, when questioned for the first time after trial and finding, see opinion.

SAME.—Evidence.—Conduct of Husband Prior to Separation.—The conduct of the husband toward the wife, previous to their separation, may be proved in order that the court may determine whether it was such as to constitute a desertion.

CHANGE OF JUDGE.—Special Judge.—Appointment.—Discretion of Court.—Under section 1770, R. S. 1881, where a change of judge has been applied

117	247
130	186
117	247
131	443
133	357
117	247
136	19
117	247
140	438
117	247
144	349
117	247
148	249
150	656
117	247
156	285
156	236
156	421
117	247
159	330

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for and granted, the matter as to who shall be appointed to try the case, rests wholly in the discretion of the court.

PRACTICE.—*Joint and Separate Exceptions.*—A joint exception can not be taken to distinct rulings, but an exception must be separately taken to each ruling.

SAME.—*Judgment.—Form.—Objection.*—An objection to the form of a judgment should point out wherein it is improper, and there should be a motion to modify it.

SAME.—*Objections to Evidence.*—Objections to evidence, to be available, must be reasonably specific.

From the Wabash Circuit Court.

B. F. Ibach, J. G. Ibach and J. D. Conner, Jr., for appellant.

B. M. Cobb and C. W. Watkins, for appellee.

OLDS, J.—This action was brought by the wife against the husband, under sections 5132 and 5133, R. S. 1881.

There are various errors assigned. One is the insufficiency of the complaint. There was no demurrer filed to the complaint. The objection urged is, that the allegations are not sufficient to charge the husband with desertion of his wife and children.

The complaint avers that the appellee had conducted herself as a kind and dutiful wife; that appellant was a person of violent temper, and without cause had frequently abused and mistreated appellee; that he charged her with infidelity and adultery with divers persons; that he threatened her life, and drove her away from home and compelled her to leave her home, and that, by reason of the tender years of the children and the violent and ungovernable temper of appellant, she was compelled to take the children with her.

This objection is one that may be obviated by the evidence and cured by the finding, and is not such a defect as will be considered when raised for the first time after trial and finding by the court. *Burkett v. Holman*, 104 Ind. 6, and authorities there cited.

If counsel desired to test the validity of the complaint for such reason, they should have done so by demurrer.

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The theory advanced by counsel that they have the right to have the complaint tested by appellee's demurrer to appellant's answer, which was withdrawn by leave of court, is not tenable.

There was a change of venue from the judge applied for by appellee, and supported by affidavit, which was granted, and an attorney appointed by the judge to try the case. Objection was made by appellant to the appointment of the attorney as special judge to try the case. It is sought to raise the question as to the right of a change of venue in a proceeding of this character; also, that the appointment of the attorney to try the cause was illegal and unauthorized.

These questions are not properly presented, and are not before this court.

The ruling of the court in sustaining the motion for a change of venue is one act of the court complained of, and the action of the court in appointing an attorney as special judge is another separate act or ruling of the court. There is no exception in the record as to the ruling on the motion for a change of venue. The record shows written objections filed to the appointment of the attorney.

There is a bill of exception in the record, showing a joint exception to both of the acts and rulings of the court. Exceptions can not be taken in this manner; exceptions must be taken to each ruling separately. *Johnson v. McCulloch*, 89 Ind. 270, and authorities there cited.

If this bill of exceptions could be construed to apply only to the appointment of the attorney—as it certainly can not be construed—so as to only apply to the ruling on the motion for a change of venue, it would present no error for which the case ought to be reversed, as, under section 1770, R. S. 1881, the right is given to the court to appoint an attorney if it shall be difficult, in the opinion of the court, for any cause, to procure the attendance of a regular judge, and the right to appoint rests wholly in the discretion of the court.

Counsel argue that the judgment is unauthorized, for the

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reason that section 5134 only authorizes "allowances to be made out of the husband's estate." Under this section there may be a judgment of some form rendered. If any error was committed it was in the form of the judgment, and the question is not properly presented to this court. There is an objection to the form of the judgment and an exception, but the objection is a general one; it does not point out wherein the judgment is improper, and there was no motion made in the court below to modify the judgment. *Sanzay v. Hunger*, 42 Ind. 44; Thornton & Ballards Annotated Indiana Practice Code, p. 227, section 564, note 2, and authorities there cited.

Error is assigned to the admission of testimony. The questions presented by the objections to the testimony are all the same. Witnesses were asked to state what was the husband's conduct toward the wife immediately before, and during the year previous to, the separation. Objection was made on the ground that it was immaterial, improper and irrelevant, and not within the issues raised in the complaint, and objection overruled and exceptions.

The objections were general, and present no question to this court. To be available, objections to evidence must be reasonably specific. *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196. If the objections were sufficient there was no error in overruling the objections, as the questions were proper to show what the conduct of the husband had been toward the wife, that the court might determine whether there had been such conduct on his part as to constitute a desertion by the husband of the wife.

The remaining question to be considered is whether the finding of the court was sustained by the evidence. This court has repeatedly decided that when there is evidence tending to support the finding of the court or the verdict of the jury, this court will not reverse the case on the mere weight of the evidence. The evidence in this case is sufficient to support the finding.

The State, *ex rel.* Ely, Drainage Commissioner, v. The Ætna Life Ins. Co.

There is no error for which the judgment ought to be reversed.

Judgment affirmed, with costs and five per cent. damages.

Filed Feb. 2, 1889.

117	251
118	291
123	490
117	251
130	584
117	251
121	284
123	601
117	251
138	564

No. 14,437.

THE STATE, EX REL. ELY, DRAINAGE COMMISSIONER, v.
THE ÆTNA LIFE INSURANCE COMPANY.

DRAINAGE.—*Act of 1883.*—*Lien of Assessment.*—*Prior Mortgage.*—The lien of a drainage assessment levied under the act of 1883 (Acts of 1883, p. 173) is junior to the lien of a pre-existing mortgage.

SAME.—*Personal Liability of Land-Owner.*—The drainage act of 1883 does not create a personal liability against the land-owner, but the enforcement of the assessment is confined to the land.

MORTGAGE.—*Resort to Property Not Embraced in.*—*Junior Lien-Holder.*—A mortgagee holding a lien on a single tract of land can not be compelled by a junior lien-holder to resort to property not embraced in his mortgage.

From the Huntington Circuit Court.

T. E. Ellison, for appellant.

J. T. Alexander and *J. M. Hatfield*, for appellee.

ELLIOTT, C. J.—On the land involved in this controversy the appellee obtained a valid mortgage lien on the 21st day of March, 1882. An assessment was made against the land for benefits accruing from the construction of a ditch, which became a lien on the land on the 22d day of April, 1886. The principal point in dispute is, which has priority, the lien of the appellee's mortgage or the lien of the assessment? The statute does not declare that the assessment shall be a

The State, *ex rel.* Ely, Drainage Commissioner, v. The *Ætna* Life Ins. Co.

prior lien, but simply provides that the assessment shall "be a lien from the date of filing the report of the commissioners." Acts of 1883, p. 173, section 5.

We do not doubt that it would have been within the power of the Legislature to provide by express words that the lien should have priority over pre-existing mortgages. *Provident Institution v. Jersey City*, 113 U. S. 506. But there is no such provision in our statute, and the question is whether the courts can put one there.

We appreciate the force of the appellant's argument, but think it one that should be addressed to the Legislature rather than the courts. We can readily perceive that there are cases in which the adjudication in favor of the priority of a mortgage lien would seriously interfere with the prosecution of a work for the promotion of the public welfare, but the creation of liens and their incidents is a legislative matter, and courts can not create such liens. 1 Jones Liens, sections 97-112.

The statute must determine the character and extent of the lien. 1 Jones Liens, section 105. It is not necessary that it should in express terms declare that the lien shall be a paramount one, for if the intention can be gathered from the general words and purpose of the statute, the courts will give it effect. The statute under consideration does not contain any provision indicating an intention to make the lien paramount to that of a pre-existing mortgage. It makes no provision for bringing the mortgagee into court; but, on the contrary, provides only that the owner shall be made a party. The inference from this is, that the rights of a mortgagee are not affected, since a mortgagee's rights can not be impaired unless he is in court. It is, therefore, apparent that the decision in *Cook v. State, etc.*, 101 Ind. 446, is one from which we should not depart, and it is decisively against the appellant.

A mortgagee holding a lien on a single tract of land can not be compelled by a junior lien-holder to resort to prop-

The Indiana, Bloomington and Western Railway Company v. Overton.

erty not embraced in his mortgage. 2 Jones Mort., section 1628; 2 Story Eq. Jur., section 634.

The drainage act of 1883 does not create a personal liability against the land-owner. The right to enforce the assessment is confined to the land.

Judgment affirmed.

Filed Feb. 2, 1889.

No. 13,427.

THE INDIANA, BLOOMINGTON AND WESTERN RAILWAY
COMPANY v. OVERTON.

RAILROAD.—*Animals.—Complaint for Wilful Killing.—Evidence.*—For a complaint against a railroad company which is held to be sufficient as charging a wilful killing by the defendant of the plaintiff's cow, within the corporate limits of a city, and for evidence held not to be sufficient to sustain the complaint, see opinion.

SAME.—*Pleading.—Theory.—Wilful and Negligent Injuries.*—Where the complaint seeks to recover for a wilful injury, the plaintiff can not, without other pleadings, shift his ground and recover upon the theory that the defendant was negligent.

From the Clinton Circuit Court.

C. W. Fairbanks and W. R. Moore, for appellant.

M. E. Clodfelter, T. E. Ballard, — Adams and H. C. Sheridan, for appellee.

MITCHELL, J.—Overton sued the railroad company to recover damages for the alleged intentional killing of his cow at a highway crossing.

He charged in his complaint "that the defendant, for the purpose and with the intention of running its train of cars

The Indiana, Bloomington and Western Railway Company v. Overton.

over and upon said cow, wilfully, recklessly and carelessly" ran its train at a great and unusual rate of speed over and through the streets of the city of Crawfordsville, in violation of an ordinance of the city, and over and upon the plaintiff's cow, and thereby wantonly and wilfully killed the animal.

While there are some ambiguous averments in the complaint, it nevertheless charges that the servants of the railroad company recklessly committed some acts, and wilfully omitted others, with the purpose and intention of running the train of cars over and upon the plaintiff's cow. It is contended on the plaintiff's behalf here that the facts averred show that the animal was purposely and intentionally run upon, and that the facts stated make the complaint good upon that theory. We are constrained to adopt this view. *Gregory v. Cleveland, etc., R. R. Co.*, 112 Ind. 385, and cases cited.

The demurrer to the complaint was therefore properly overruled. The evidence fails completely, however, to sustain the complaint.

There is an entire absence of evidence tending to show either an actual or constructive intent on the part of any person connected with the management of the train to run upon or over the plaintiff's cow.

The engineer in charge of the engine testified that he did not see the cow upon the track until he was within about one hundred feet of the crossing, and that he had no intention whatever of running upon the animal. There is not a syllable of testimony, nor are there any circumstances, tending to contradict the engineer's evidence.

It does not appear that the train was being run at a dangerous or unusual rate of speed, nor was it shown that the crossing was of such a character as made it the duty of the engineer to be on the lookout for animals, or to take extraordinary precautions. *Dennis v. Louisville, etc., R. W. Co.*, 116 Ind. 42.

Bradley v. Thixton *et al.*

It is argued that the engineer was negligent in not discovering the cow and stopping his train or frightening the animal off the track, but it must be remembered that the complaint does not count upon a right of action based upon the company's negligence. A case like this must proceed upon one theory or the other. A party can not frame a single paragraph of complaint in such manner as to be entitled to recover either for an intentional or negligent injury, as the facts may appear. The plaintiff having elected to sue for an injury intentionally and wilfully committed, he must stand by that theory, and can not, without other pleadings, shift his ground and recover upon the theory that the defendant was negligent.

The judgment is reversed, with costs, with directions to the circuit court to sustain the appellant's motion for a new trial.

Filed Feb. 2, 1889; petition for a rehearing overruled March 30, 1889.

117	955
117	957
121	913
117	955
120	918

No. 14,480.

BRADLEY v. THIXTON ET AL.

DESCENT.—Husband and Wife.—Adulterous Husband.—Judicial Sale of Husband's Land.—Estate Acquired by Wife Thereunder.—Under section 2497, R. S. 1881, a husband who is living in adultery at the time of his wife's death can take no part of her estate; and so, where she dies seized of land acquired by force of the act of 1875, relating to judicial sales of the husband's property, he is entitled to no interest therein, notwithstanding the provision in said act that land so acquired by a wife shall descend to the husband, as that provision must be construed to mean that he may take when capable of taking.

From the Washington Circuit Court.

Bradley v. Thixton *et al.*

D. M. Alsbaugh and J. C. Lawler, for appellant.

A. Elliott and S. B. Voyles, for appellees.

ELLIOTT, C. J.—Sarah Durnil was the wife of Bryson A. Durnil. He became the owner of the real estate in controversy during the lifetime of his wife, and mortgaged it to Henry J. Prier, but the wife did not join in the mortgage. A suit for foreclosure was instituted against the mortgagor, and a decree foreclosing the mortgage was rendered. The wife was not a party to this suit. In 1877 the land was sold on the decree. Bryson A. Durnil abandoned his wife and lived in adultery with a woman named Dewey. He was living in adultery with this woman at the time of his wife's death, which occurred in 1880. Bradley brought this action against her heirs, the appellees, to recover the land owned by her husband and mortgaged to Prier. They recovered the estate in the land held by her.

The judgment is right. Under the act of 1875 Mrs. Durnil became the owner of an estate in the land upon the sale on the decree of foreclosure. Her inchoate right was then transformed into an absolute and vested one. *Elliott v. Cale*, 113 Ind. 383; *Shelton v. Shelton*, 94 Ind. 113; *Pattison v. Smith*, 93 Ind. 447; *Summit v. Ellett*, 88 Ind. 227; *Riley v. Davis*, 83 Ind. 1; *Elliott v. Cale*, 80 Ind. 285; *Hollenback v. Blackmore*, 70 Ind. 234.

The sale on the decree did not divest the wife's interest, but left it complete and vested in her. *Taylor v. Stockwell*, 66 Ind. 505; *Ketchum v. Schicketanz*, 73 Ind. 137; *Keck v. Noble*, 86 Ind. 1; *Mattill v. Baas*, 89 Ind. 220.

The title of Mrs. Durnil was, therefore, full and perfect, and she was, in law and in fact, the owner of an estate in the land. Her ownership was as complete as if she had acquired title in any other mode than through her husband. As this was the nature of her title, it must follow that it was governed by the same rules of law as would have prevailed had she become the owner of the land by gift or purchase. She

Bradley v. Thixton et al.

was the absolute owner, and her rights, and those of her heirs, are not impaired or altered by the mode in which she became invested with the ownership.

The law that applies to ordinary owners, situated as Mrs. Durnil was, applied to her in life, and applies now to her heirs, she being dead. That law is thus declared: "If a husband shall have left his wife, and shall be living, at the time of her death, in adultery, he shall take no part of her estate." R. S. 1881, section 2497.

The interest in the land which vested in the wife upon the sale under the decree of foreclosure was part of her estate, and the law, as clearly as it is possible for language to do, commands that the husband who is living in adultery shall take no part of that estate. To award it to him would be to disregard as plain a statute as was ever penned.

The act of 1875 is not to be taken as an isolated and detached law; but, on the contrary, it must be taken as part of one great system of law. *Morrison v. Jacoby*, 114 Ind. 84 (90); *Chicago, etc., R. W. Co. v. Summers*, 113 Ind. 10 (15); *Robinson v. Rippey*, 111 Ind. 112, and authorities cited; *Robertson v. State, ex rel.*, 109 Ind. 79 (87); *Humphries v. Davis*, 100 Ind. 274 (284).

No statute can stand entirely alone. It must be considered in connection with the other laws, written and unwritten, of the country. The jurisprudence of a nation is not composed of disconnected fragments, but of laws united in one great body.

The act of 1875, in providing that land acquired by the wife by force of its provisions shall descend to the husband, must be considered in connection with other rules and statutes, and, when thus considered, it is plain that the husband can not take in a case where another statute absolutely and unequivocally declares that he shall take no part of the wife's estate. A husband incapacitated by positive law from taking any part of his wife's estate, can not be invested with it

 Bowen v. Mauzy.

by the courts. A statute so clear and positive as ours can not be disregarded. The act of 1875 must, therefore, be construed to mean that the husband may take the wife's land acquired through him, in all cases where he is capable of taking; but it can not be so construed as to allow him to take where a positive statute declares that he shall take no part of her estate.

The court, in adjudging that each party should be taxed with costs, did not commit an error of which the appellant can complain.

Judgment affirmed.

Filed Jan. 9, 1889; petition for a rehearing overruled March 5, 1889.

 No. 13,478.

BOWEN v. MAUZY.

117	258
135	558
117	258
144	124

INJUNCTION.—*Lawful Business.—Nuisance.*—In order that a person may be restrained by injunction from commencing the operation of a business in itself legitimate, it must appear that the defendant threatens and intends to conduct the business in a manner which will constitute a nuisance.

SAME.—*Blacksmith Shop.—Complaint by Adjacent Proprietor.—Presumption that Business will be Properly Conducted.*—The business of blacksmithing and horse-shoeing is lawful and not in itself a nuisance, and the presumption is that one about to engage therein will conduct the same in a proper manner; therefore, a complaint for injunction alleging that the defendant is constructing a building on his lot adjacent to the plaintiff's residence for the purpose of carrying on such business, is bad if it fails to aver as a fact that the defendant threatens or intends to conduct the same improperly, or that it can not be conducted at such place without material injury to the plaintiff.

From the Rush Circuit Court.

Bowen v. Mauzy.

W. A. Cullen, D. S. Morgan and H. E. Barrett, for appellants.

C. Cambern, T. J. Newkirk, J. Q. Thomas and B. L. Smith, for appellee.

OLDS, J.—This action was brought in the Rush Circuit Court for injunction to enjoin the defendants from converting a house adjoining the plaintiff's residence into a blacksmith shop. The plaintiff avers in his complaint that he is the owner in fee of city lot 68, in the town of Rushville, and has his residence property thereon, and resides in the same with his wife and family, and has resided there for a long number of years in peace and quiet; that defendant Bowen is the owner of lot 67, in said town, and situated thereon immediately west of the plaintiff's residence, and twenty-eight feet from the front door thereof, there is an old one-story frame shop which the defendants Bowen and Kirkpatrick are converting into a public blacksmith shop, for the purpose of shoeing horses and doing a general blacksmithing business; that the erection and maintaining of a blacksmith shop at such place will destroy the free use of the plaintiff's property, and will essentially interfere with the comfortable enjoyment of the lives of himself and family and his property; that if it is allowed to be maintained the gases and smoke from the forges in the shop will at all times fill his house with smoke and smells unbearable and offensive to the senses and very injurious to the health of himself and family, to such an extent that he will have to abandon his property; that the noise, clatter, loud and boisterous language that will be used in and around the shop, the accumulation of vehicles and filth in and about the shop, will destroy the free use of the plaintiff's property and make life a burden to himself and family; all of which would be very offensive, injurious and detrimental to the health of plaintiff and his family, and which would be to his great damage in the sum of \$2,000. Prayer for an injunction perpetually enjoining the de-

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defendants from erecting, maintaining or using the building as a blacksmith shop.

The defendants below filed a motion to strike out parts of the complaint, which was overruled; exceptions. They then filed a demurrer to the complaint, which was overruled by the court, to which action of the court in overruling the demurrer the defendants excepted and refused to amend, and the court rendered judgment in favor of plaintiff against the defendants, perpetually enjoining them from using the building as a blacksmith shop.

The defendants objected and excepted to the judgment, and the defendant Bowen appeals to this court.

The only error assigned and relied upon by counsel for the appellant is the overruling of the demurrer to the complaint.

The material averments in the complaint are, that the appellee is the owner of lot 68, in the town of Rushville, on which he resides and has resided with his family for a long number of years; that the appellant, Bowen, is the owner of lot 67, adjoining lot 68, and twenty-eight feet distant from appellee's residence. On appellant's lot there is a frame shop, which appellant Bowen and Kirkpatrick are converting into a public blacksmith shop for the purpose of shoeing horses and doing a general blacksmithing business. The additional allegations are mere conclusions, assuming that by reason of converting the building into a blacksmith shop for shoeing horses and doing general blacksmithing, it will destroy the free use of appellee's property, essentially interfere with the comfort of himself and family, and that smoke from the forges will fill his house and be unbearable and offensive to the senses and injurious to the health of himself and family.

In a proper case an injunction will lie to prevent the use of property for operating a business which is a nuisance *per se*, and even to be used for a business not a nuisance *per se*, if threatened and intended to be conducted in an improper manner, so as to constitute a nuisance. An injunction will

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lie to prevent a nuisance threatened and in progress, as well as to abate one already in existence. See *Keiser v. Lovett*, 85 Ind. 240; *Appeal of Czarniecki*, 11 Atl. Rep. 660; *Cleveland v. Citizens Gas Light Co.*, 20 N. J. Eq. 201; *Biddle v. Ash*, 2 Ashm. 211.

In the well considered case of *Owen v. Phillips*, 73 Ind. 284, the court says: "It is not every injury which will support an action for damages that will entitle the complainant to relief by injunction," citing numerous authorities in support of that doctrine and then adding: "There are solid reasons supporting this rule. A lawful business may be so conducted as to become a nuisance, but, in order to warrant interference by injunction, the injury must be a material and essential one. Damages may be paid by the author of the nuisance and the business not be stopped, but if injunction issues then the right to conduct the business is at an end. The necessity which will authorize the granting of the writ of injunction, to restrain the carrying on of a business lawful in itself, must be a strong and imperious one. If it were otherwise, all mills and manufactories might be stopped at the demand of those to whom they caused annoyance, even though the injury complained of might be slight and trivial."

It is well settled that courts of equity will not interfere to restrain a legitimate business except when the injury is material and the reasons for granting an injunction are strong and weighty.

In the case of *Cleveland v. Citizens Gas Light Co.*, *supra*, the learned chancellor says: "It is usual and proper where a building or works are being erected that can only be used for a purpose that is unlawful, to restrain the erection. The works, if erected, might tempt the owner to use them, and it seems like trifling to permit any one to go on with a building which he can never be permitted to use. But in this case, as will appear hereafter, I am not entirely satisfied that it is impossible to manufacture gas in some way that

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will not be a nuisance to houses situate as those of the complainants, and therefore I do not feel justified in restraining the erection of buildings, but will permit the defendants to use their own discretion in going on with them, if they choose to do so, after hearing the views entertained of the rights of the complainants and others in like situation." This case is cited and approved by this court in *Keiser v. Lovett, supra*.

Applying this doctrine to an application to restrain the entering into a lawful business, it is necessary, in order to restrain a person from commencing the operation of a business in itself legitimate, that it should be made to appear that the person about to enter into such business threatens and intends to conduct the business in a manner which will constitute a nuisance.

If such facts are not shown as to make it appear affirmatively that he intends to conduct the business in a manner so that it will constitute a nuisance, it will be presumed that he will conduct the business properly and so that it will not interfere with the rights of others, and courts of equity will not interfere by injunction, under the rules of law we have stated. The affirming or reversing of this case depends upon the construction to be given to the complaint.

It is contended by the appellee that the demurrer admits the truth of all the allegations in the complaint, and that it admits that the shoeing of horses and conducting a general blacksmithing business at the place proposed, will destroy the free use of appellee's property, and essentially interfere with the comfortable enjoyment of the lives of appellee and his family; that the gases and smoke from the forges will fill his house with smoke, boisterous language be used, and filth accumulate, etc.

The demurrer admits the truth of all the facts stated in the complaint, but it does not admit the mere conclusions of the pleader drawn from the facts stated. The business of blacksmithing is a lawful business, and is not in itself a nuisance, and like any other lawful business only becomes so

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when conducted in an improper way, to the material and essential injury of others.

The presumptions are that the person entering into and conducting such business will conduct it in a proper way, so that it will not constitute a nuisance or injure and annoy the adjoining property-owners.

The material facts stated in the complaint, which bear upon the question of a nuisance and are admitted by the demurrer, are the proximity of the building to the plaintiff's residence, and that the defendants are about converting the building into a blacksmith shop to do horse-shoeing and general blacksmithing; then without alleging that the business can not be conducted in such a way as to not be detrimental to the appellee, or that the appellant was threatening or intending to conduct the business in an improper way, by reason of which improper use of the same essential injury and damage would result to the appellee, it is not alleged but that he could and would so construct the building as to prevent all injury. There are no allegations as to the manner in which the building is to be constructed. After alleging the fact that appellant intends to conduct a general blacksmithing business, it is inferred and stated that all the imaginary injuries named will follow as the natural and usual result of the business. The inferences drawn by the pleader are prospective and imaginary; for aught that appears from the complaint, they may or may not arise, owing to the construction of the building and the manner in which the business is conducted. The demurrer admits the legitimate inferences to be drawn from the facts stated, and, in the absence of threats or intentions on the part of the appellant to do otherwise, the presumptions are that he would construct the building and conduct the business in a proper way, so as not to work annoyance to adjoining property-owners, or so as not to constitute a nuisance.

To hold the complaint good would be to hold that any complaint would be good to enjoin any legitimate business

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by alleging that the complainant owned and resided upon a lot, and the adjacent lot-owner was about erecting a building on his lot in close proximity to the complainant's residence to carry on mercantile or other lawful business which would be patronized by the public, and drawing like inferences to those drawn in this complaint, without averring that the person threatened or intended conducting the business in an improper way, or that it could not be conducted at such place without injury and damage to the complainant. Like imaginary inferences might be alleged as to almost any legitimate business.

The appellee cites the case of *Keiser v. Lovett, supra*, in support of this complaint. In that case the complaint averred that, between the lots of plaintiff and defendant, there was a gravelled way eight feet wide, in which each had an easement and which was used by them in common, and which was the only way from the front to the rear of their respective lots, and that defendant was obstructing the way by the erection of the stable, and the court held the complaint good by reason of that allegation being coupled with the others.

The court erred in overruling the demurrer to the complaint, and the judgment is reversed, with instructions to sustain the demurrer to the complaint.

Filed Jan. 12, 1889; petition for a rehearing overruled March 12, 1889.

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No. 13,454.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. SANDFORD, ADMINISTRATRIX.

RAILROAD.—*Negligence.—Defective Bridge.—Continuing in Service with Knowledge of.—Assumption of Risk.*—One in the service of a railroad company in the capacity of baggage-master, assumes the increased risk resulting from an insufficient bridge on the line of road over which he runs, and waives any claim upon the employer for damages, if he has notice of its dangerous character and thereafter voluntarily continues in the service.
SAME.—*Complaint.—Allegation that Employee was Ignorant of Danger.*—A complaint against a railroad company seeking to recover for the death of an employee, caused by the fall of a bridge beneath the train on which he was employed, which it is alleged the defendant had permitted to become unsafe, is bad unless it is averred that the intestate was ignorant of the unsafe condition of the bridge.

From the Floyd Circuit Court.

G. W. Easley, G. W. Friedley, C. L. Jewett, H. E. Jewett and
G. R. Eldridge, for appellant.

A. Dowling, for appellee.

ELLIOTT, C. J.—The appellee alleges in her complaint that Charles W. Sandford, her intestate, was in the appellant's service in the capacity of a baggage-master; that, on the line of the appellant's railroad, and forming part of its road, was a bridge across a stream; that, on the 24th day of December, 1883, and for a long time prior to that day, the appellant had negligently permitted the bridge to become unsafe; that the piers were weak and not capable of resisting the force of floods to which the stream was subject; that, on the 24th day of December, 1883, while the plaintiff's intestate was being carried over the road as baggage-master, the bridge fell, and without fault on his part he was killed.

The complaint sufficiently shows that the plaintiff's intestate was not guilty of contributory negligence, for the general averment that he was without fault excludes the existence

117	265
117	561
118	558
121	126
123	500
117	265
124	428
127	51
117	265
120	325
117	265
122	243
123	446
123	242
117	265
124	159
124	244
125	265
117	265
127	312
128	22
117	265
143	575
117	265
152	595
117	265
154	154
117	265
159	151
117	265
160	264
160	271
117	265
161	674
161	683
161	685
161	686
162	93
162	562
117	265
163	252
117	265
164	651
117	265
170	88

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of contributory negligence. *Evansville, etc., R. R. Co. v. Crist*, 116 Ind. 446; *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196; *Mitchell v. Robinson*, 80 Ind. 281; *Pittsburgh, etc., R. W. Co. v. Wright*, 80 Ind. 182.

But there is no averment that the intestate was ignorant of the unsafe condition of the bridge, and the omission of this averment presents the only difficult question arising on the demurrer to the complaint.

The general rule is that an employer must use reasonable care, skill and diligence to provide his employees with a safe working place, and that he must also make reasonably safe the machinery and appliances which the nature of the service requires his employees to use. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Baltimore, etc., R. R. Co. v. Rowan*, 104 Ind. 188; *Krueger v. Louisville, etc., R. W. Co.*, 111 Ind. 51; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Louisville, etc., R. W. Co. v. Wright*, 115 Ind. 378; *Louisville, etc., R. W. Co. v. Buck*, 116 Ind. 566.

This rule requires a railroad company to construct and maintain the bridges which carry its rails across brooks and rivers in a reasonably safe condition. The employees enter its service under an implied contract that this duty will be performed, and, under this contract, they impliedly assume all the ordinary perils of the service. Employees assume all the ordinary risks incident to the employment, but they assume no extraordinary risks caused by the employer's breach of duty, unless they have knowledge of the unusual danger caused by the breach, and voluntarily continue in the company's employment. If, with this knowledge, they do continue, then the increased danger becomes an incident of the service which they assume, and for liability from which the master is exonerated. *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20.

The knowledge of the danger adds it as one of the incidents of the employment which the employee assumes. It becomes a danger which his continuance in the master's ser-

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vice makes an incident of the service, and when it takes this character the master is no longer bound to answer for the employee's safety, so far as it is imperilled by the danger voluntarily and knowingly assumed. The knowledge, in conjunction with the continuance in the service, operates as a waiver of the right to make the master responsible. "It is," says Mr. Beach, "the rule applicable to this matter that if the servant, when the defect or danger is brought to his knowledge—when he discovers that the machinery, buildings, premises, tools, or any other instrumentalities of his labor, are unsafe or unfit, or that a fellow-servant is careless or incompetent—continues in the employment, without protest or complaint, he is deemed to assume the risks of such danger, and to waive any claim upon his master for damages in case of injury." Beach Cont. Neg., section 140.

This puts the rule exonerating the master on the true ground. He is exonerated because the employee himself assumes the danger, as increased, and, as he voluntarily assumes it, the master is relieved. The parties change positions; the employee assumes the risk that, if it were not for his knowledge, his employer would be compelled to assume. The duty which the employer is under is materially affected by the element of knowledge, and unless a duty is shown of course there can be no actionable negligence, since a duty lies at the foundation of every right of action grounded on the negligence of a defendant. It must follow, in order to show a breach of duty creating a cause of action for its breach, that it is necessary to aver that the employee was ignorant of the default of the employer which increased the perils of the service.

The plaintiff in such a case is the actor, and must show a complete cause of action, and, to do this, he must aver facts showing that the danger which augmented the risks of his service was not known to him. In at least two cases this court has explicitly affirmed this doctrine. *Lake Shore, etc., R. W. Co. v. Stupak*, 108 Ind. 1; *Indiana, etc., R. W. Co. v. Dailey*, 110 Ind. 75.

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From these decisions we should not depart, unless thoroughly satisfied that they are unsound in principle, and of this we are far from being convinced. There is some conflict in the authorities as to the principle upon which rests the rule exonerating the employer from liability, in cases where the employee continues in the employer's service after knowledge that his peril has been increased, but the weight of authority, as we believe, supports our decisions. All the authorities agree that negligence on the part of the employer is not to be presumed, and that it rests on the plaintiff to aver and prove every fact essential to the existence of actionable negligence. *Riest v. City of Goshen*, 42 Ind. 339; *Pennsylvania Co. v. Whitcomb*, *supra*; *Summerhays v. Kansas Pacific R. W. Co.*, 2 Col. 484; *Mobile, etc., R. R. Co. v. Thomas*, 42 Ala. 672; *State v. Philadelphia, etc., R. R. Co.*, 60 Md. 555; *Davis v. Detroit, etc., R. R. Co.*, 20 Mich. 105; *The Gladiolus*, 21 Fed. Rep. 417; *Cummings v. National Furnace Co.*, 60 Wis. 603; *Belair v. Chicago, etc., R. R. Co.*, 43 Iowa, 662.

In stating what the employee must prove, a recent writer asserts that he must establish that he did not know, and had not equal means with the master of knowing, that the machine or appliance was defective. *Proof and Pleading in Accident Cases*, section 21. Many of the authorities we have cited and those which follow assert the same general rule. *Rear-don v. New York, etc., Card Co.*, 19 Jones & S. 134; *Duffy v. Upton*, 113 Mass. 544; *Leary v. Boston, etc., R. R. Co.*, 139 Mass. 580; *Wright v. New York Central R. R. Co.*, 25 N. Y. 562; *Stoeckman v. Terre Haute, etc., R. R. Co.*, 15 Mo. App. 503; *East Tennessee, etc., R. R. Co. v. Duffy*, 12 Lea, 63; *East Tennessee, etc., R. R. Co. v. Stewart*, 13 Lea, 432; *St. Louis, etc., R. W. Co. v. Harper*, 44 Ark. 524; *Colorado Central R. R. Co. v. Ogden*, 3 Col. 499.

Men may accept employment in a service of a perilous character and yet not be guilty of contributory negligence, although they do assume all the risks incident to the service which they

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enter. Men may, without being guilty of contributory negligence, engage in the business of manufacturing gunpowder or dynamite, and yet, when they do engage in such a business, they take upon themselves all the ordinary risks incident to it. Employees engaged in any business, however dangerous its character, have a right to assume that their employer will not subject them to any unknown or extraordinary danger; the employer, however, is bound to do no more than use ordinary care, skill and diligence to provide for their safety, but this requires that he shall do all that the nature of the employment will permit to accomplish this object. But if he fails to do his full duty, and the employee has seasonable and adequate knowledge of the failure, and continues in the service, he assumes the risk resulting from this failure. There is a class of cases where a man has no right to assume the risk. Society has an interest in the lives of its members, and no citizen has a right to knowingly and voluntarily place himself in a position of immediate and certain danger. *Indianapolis, etc., R. W. Co. v. Watson, supra*; *Cunningham v. Chicago, etc., R. R. Co.*, 17 Fed. Rep. 882 (12 Am. & Eng. R. R. Cases, 217).

Where the danger is not immediate and certain, a man may assume the risk without violating the rule last stated, but in doing so he divests himself of a right to recover from his employer in cases where the danger is fully and seasonably brought to his knowledge, since the known danger becomes in such cases one of the risks he assumes as an incident of his service. He may not be guilty of contributory negligence in taking some risk, since he may be doing what other reasonably prudent men likewise do; but, like all the others in the common service in which he engages, he assumes all the risks arising from dangers of which he has full notice, by continuing in service after he obtains that knowledge.

The question comes to us as one of pleading and not as one of evidence. Material facts must be directly stated in a pleading, but they may be inferred from testimony and from

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circumstances, when the question is as to the measure and sufficiency of proof. Inferences are admissible and controlling where the question is one of proof, but not so where the question is one of pleading. It is not enough to plead evidence from which facts may be inferred, but the facts themselves must be stated in an issuable form.

Judgment reversed.

Filed Jan. 30, 1889; petition for a rehearing overruled March 28, 1889.

117	970
118	158
181	864
183	95
117	970
194	449
117	970
156	699

 No. 13,068.

NITCHE v. EARLE.

NEW TRIAL.—As of Right.—Notice.—The failure of a party obtaining a new trial as of right, under section 1064, R. S. 1881, to give the notice to the opposite party required by section 1065, is not ground for vacating the order granting the new trial.

SWAMP LANDS.—Patent.—Custodian of Records.—Copies.—Evidence.—Section 5628, R. S. 1881, makes the auditor of state the custodian of swamp land records, and a copy of letters-patent, properly authenticated by him, is, under section 462, admissible in evidence.

SAME.—Presumption that Officer Does His Duty.—Courts take knowledge that the secretary of state was required by statute to record letters-patent for swamp lands, and that the custody of such records was transferred from the secretary to the auditor of state, and, in the absence of a showing to the contrary, it will be presumed that patents were duly recorded, and that the records were turned over to the auditor.

SAME.—Designation and Certification of Records.—Evidence.—The books in which the secretary of state recorded patents were not required to be designated on the outside as records of patents, nor was the secretary required to attach any certificate to the same, and evidence that a book from which a copy of a patent was made was lacking in these respects was properly excluded.

SAME.—Recording of Patent.—Swamp land patents issued by the State are

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not required to be recorded in the county where the land is situate, but they are to be recorded in the office of the secretary of state, and the title of the act providing for such record is broad enough to cover this provision.

SAME.—Title.—Proof.—Common Source.—Where a plaintiff and defendant claim land in controversy through a common source of title, it is sufficient for the plaintiff to deduce his title from the common source.

EVIDENCE.—Estoppel.—Practice.—A party who secures a ruling excluding evidence offered by his adversary on a particular subject can not complain of the exclusion of evidence offered by himself to establish the opposite of what the other party had attempted to prove.

From the Lake Circuit Court.

J. Kopelke, for appellant.

C. F. Griffin, for appellee.

OLDS, J.—This action was commenced by appellee against appellant on the 2d day of March, 1881, in the Lake Circuit Court, to recover the possession of, and quiet title to, a tract of land in Lake county, Indiana.

Issues were formed and the case tried by the court at the November term, 1881, and judgment rendered for appellee upon a special finding of facts. From that judgment appellant, Nitché, appealed to this court, and the cause was reversed. *Nitché v. Earle*, 88 Ind. 375. Under the direction of this court the court below, at the September term, 1883, entered judgment for appellant upon the special finding of facts. At the February term, 1884, the plaintiff obtained a new trial as of right. At the April term, 1884, appellant appeared to the action and moved the court to vacate the order granting the new trial, for the insufficiency of the bond, which motion was overruled, and at the September term, 1884, appellant moved to vacate the order granting a new trial, for failure of the plaintiff below, the appellee, to give notice thereof, which motion was overruled, to which ruling appellant excepted. Another trial was had at the February term, 1886, and judgment rendered in favor of appellee. A motion was made by appellant and his co-defendants for a new trial, but

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the motion was overruled and this ruling was excepted to by appellant.

The errors assigned are, that the court erred in overruling the motion of appellant to vacate the order granting the appellee a new trial, for the reason that no notice was given thereof, and the overruling of the motion for a new trial.

There was no error in overruling appellant's motion to vacate the order granting a new trial.

In the case of *Stanley v. Holliday*, 113 Ind. 525, this court has placed a construction on section 1065, R. S. 1881, and the court, in that case, says: "The intention of the Legislature in requiring that 'the party obtaining a new trial shall give the opposite party ten days' notice thereof before the term next succeeding the granting of the application,' as we construe such requirement in connection with the other provisions of the statute relating to new trials as of right, was to prevent either party from forcing the opposite party into trial at or during the term at which the new trial was granted, or 'before the term next succeeding.' This provision of section 1065 was rendered necessary, we suppose, to prevent the plaintiff in such a case from forcing defendants into trial during the term at which the new trial was granted, under provisions of section 516, R. S. 1881."

Under this authority, the action of the court was right in granting the new trial and overruling appellant's motion to vacate for failure of notice.

Several questions are presented upon the overruling of the motion for a new trial. The first is the admission by the court in evidence, over objection of appellant, of a certified copy of the record of a patent by the State of Indiana to George Earle for the real estate described in the complaint, which record of patent was certified to by James H. Rice, auditor of state. It is urged that it is shown on the face of the record not to be the copy of any record; that for all that it shows on the face of it, it may be the original patent; that it has the signatures of the Governor and secretary of state,

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and nowhere has a certificate of the secretary of state that he recorded it; and counsel insist that unless the instrument shows, by official entries or certificates by officers who made it, that it is a record, it is no record; that a volunteer statement by the present keeper, giving his opinion about it, will not make it a record; that, by the original law, these records were to be kept in the office of the secretary of state, and that the certificate of the auditor of state should show how he came by the book.

The instrument offered and admitted in evidence was a certified copy of letters-patent to George Earle for the lands in question in this case, the auditor of state certifying the same to be "a full, true and complete copy of the record of letters-patent, executed and issued on the 12th day of January, 1857, by the State of Indiana to George Earle, for the lands therein described, as the same appears on page 379, of the record of swamp lands, vol. 33, range west, now on file in my office, and of which record I am the legal custodian," properly signed by the auditor of state and seal attached.

By section 5628, R. S. 1881, all records pertaining to swamp lands were transferred from the office of the secretary of state to the office of the auditor of state.

Section 462 prescribes the manner in which all copies of records in public offices shall be certified, and makes them admissible in evidence. The statute makes the auditor of state the proper custodian of the records of letters-patent, which were formerly recorded by the secretary of state and kept in his office, and this copy of the record was properly authenticated.

Section 4, 1 G. & H., p. 607, made it the duty of the secretary of state to record these letters-patent in books to be kept in his office. Thus it was first provided by statute and made the duty of the secretary of state to record the letters-patent in a book in his office, and afterwards this record was by statute transferred to the office of the auditor of state.

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Courts take knowledge of the public statutes of the State, and, in the absence of evidence to the contrary, the presumption of law is that the officers discharge their duties, and the presumption in this case would be that the secretary of state recorded the patent, and that the record book containing the same had been by him turned over to the auditor of state. *Evans v. Browne*, 30 Ind. 514; *Ward v. State*, 48 Ind. 289; *Evans v. Ashby*, 22 Ind. 15.

The next question presented is, the appellant called one Johannes Kopelke as a witness, and offered to prove that he had examined the book from which the auditor of state made his copy of the pretended record of the Earle patent, and that it contained no official certificate, and was not on the outside designated as a record book. Letters-patent were required by statute to be recorded. The statute providing for the record simply makes it the duty of the secretary of state to record them "in books to be kept in his office." It does not require the book to be designated on the outside as a record of patents or to have any indorsement whatever on the same, or that the secretary of state shall attach any certificate to the same. So the evidence excluded was improper and the ruling of the court was correct. Appellant also offered to prove by one A. D. Palmer, a witness on his behalf, who had also purchased the same tract of land of the State, and obtained a patent therefor May 2d, 1866, and through whom appellant claimed title, that before he purchased the land in controversy of the State he made search at the State and county offices, and could find no previous conveyance of record. It also appears in the record that appellee offered in evidence the depositions of Erasmus B. Collins, who testified in such deposition that he was the same Collins who was secretary of state of the State of Indiana, and signed said letters-patent to Earle, and that he recorded them in vol. 33, Record of Swamp Lands, in the State of Indiana, on page 379, and that said record was made January 12th, 1857; also the deposition of James H. Rice, the

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auditor of state, to show that said record had been transferred to the office of the auditor of state, and was in his possession at the time of making the certificate, which deposition was objected to by counsel for appellant on the ground that it was an attempt by said deposition to prove matters of record by parol evidence, and the objection was sustained and the deposition excluded.

The evidence of Palmer was to show the absence of a record in the office of the secretary of state which the deposition sought to show was made and was in said office at the time and long before the making of the patent to Palmer. If parol evidence was proper to show there was no such record made or kept in the office of the secretary of state at a certain time, then, certainly, evidence to show that such record was in fact made and was in the office at that time, was proper. A party must be consistent. If he objects and secures a ruling against his adversary, excluding evidence on a particular subject, he can not be heard to complain when the court applies the same rule and excludes evidence offered by him to establish the opposite of what his adversary had attempted to prove by the evidence which was excluded on his objection. In the case of *Dinwiddie v. State*, 103 Ind. 101, this court says: "It is settled by the adjudications of this court, that a party can not make available, for the reversal of a judgment, the exclusion of evidence, where, upon his objection, like evidence was excluded when offered by the other party." *Hinton v. Whittaker*, 101 Ind. 344.

And this doctrine applies with full force to the objection raised by appellant to the exclusion of the testimony of Palmer.

The law does not require these patents to be recorded in the recorder's office; it is so decided in the case of *Mason v. Cooksey*, 51 Ind. 519, and is recognized as the law by this court in the former decision of this case.

It is contended that the law providing for the recording of letters-patent in the office of the secretary of state is un-

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constitutional, for the reason that it does not come within the provisions of section 19, article 4, of the Constitution.

We think otherwise. The title of the original act to which this was supplemental was "An act to regulate the sale of the swamp lands donated by the United States to the State of Indiana, and to provide for the draining and reclaiming thereof, in accordance with the condition of said grant." 1 G. & H., p. 606.

The title is broad enough to cover all things done in connection with the sale and in connection with the execution of the patent. The statute provides that the secretary of state, one of the officers who signs it, shall record it in his office. It is ordered recorded in connection with the making of the patent, and the title is broad enough to cover the provisions of the act requiring the record.

It is claimed that, as the appellee never had possession of the real estate, it is incumbent on him, to entitle him to a recovery, to show a complete chain of title from the United States down to him.

This theory is not tenable in this case. Courts of this State take knowledge of the acts of Congress granting to this State swamp land, which, taken in connection with the patent from the State, makes a complete chain of title. In addition to this, it is a well settled principle that when the plaintiff and defendant claim through a common source of title, it is sufficient for the plaintiff to deduce his title from the common source of title. In this case both plaintiff and defendant claim title from the State of Indiana, and it was only incumbent on the plaintiff to show that he had the better title from the State. *Smith v. Lindsey*, 89 Mo. 76; *Miller v. Hardin*, 64 Mo. 545; *Miller v. Surls*, 19 Ga. 331 (65 Am. Dec. 592); *Barnard v. Whipple*, 29 Vt. 401 (70 Am. Dec. 422).

The evidence supports the finding of the court.

We find no error for which this cause ought to be reversed. Judgment affirmed, with costs.

Filed Jan. 29, 1889; petition for a rehearing overruled March 5, 1889.

Grubb v. The State.

No. 14,677.

GRUBB v. THE STATE.

CRIMINAL LAW.—Failure of Defendant to Testify.—Instruction.—Practice.—

The trial court is not required to instruct the jury, as provided in section 1798, R. S. 1881, that the failure of the defendant to testify in his own behalf shall not be considered by them, unless it is asked to do so as provided in section 1823, and it is too late to make such request after the argument is closed and the jury instructed.

SAME.—Evidence.—Letter.—Authorship.—In determining the authorship of a letter offered in evidence, and attributed to the defendant, the court has the right to consider anything appearing on its face, in connection with the other evidence bearing on the question, and it is not required to instruct the jury not to consider remarks made by the court in their presence and constituting the reasons for its decision.

SAME.—Misconduct in Argument.—Where counsel for the State is guilty of misconduct in argument, and the trial court does all it can and all that it is asked to do to remedy the injury that may be done to the defendant thereby, the matter will not be reviewed in the Supreme Court. If the defendant thinks the injury is of such a character as not to be remediable by any action of the court, he should move to set aside the jury, or take such other steps as he may think necessary to secure him an impartial trial.

SAME.—Expert Witness.—Cross-Examination.—Waiver of Error.—Where a witness, examined as an expert, expresses an opinion based upon facts assumed by the party introducing him to have been proved, or upon a hypothetical case put by such party, the other party may cross-examine the witness by taking his opinion upon any other set of facts assumed by him to have been proved, or upon a hypothetical case. If the right to so cross-examine is denied, the error will be cured if the party calls the witness in his own behalf and proves the matters he attempted to elicit by cross-examination.

SAME.—Insanity.—Non-Expert Witness.—Opinion.—Where the soundness of the defendant's mind is in question, a witness who talked with him on the day on which he says he was sane, and a witness who has known him intimately for several years, may, upon stating the facts, give opinions as to the condition of his mind.

SAME.—Opinion Must be Based on Facts Stated.—Insanity is a fact that can not be proved by reputation; nor by a witness who is not an expert, unless the witness first gives the facts upon which his opinion is based.

SAME.—Irresistible Desire to Take Life.—It is proper to refuse to instruct

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the jury as matter of law that insanity "sometimes takes the form of an irresistible desire to take human life."

SAME.—Refusal to Give Instructions.—Reversal of Judgment.—A case will not be reversed on account of the refusal of the court to give an instruction, if the instructions given cover the essential elements of the law contained in the instruction refused.

SAME.—Insanity.—Instructions Upon.—For a consideration of instructions, given and refused by the trial court, upon the subject of insanity as a defence in a prosecution for homicide, see opinion.

From the Knox Circuit Court.

W. A. Cullop, A. P. Twineham, J. S. Pritchett, C. B. Kesinger and W. D. Robinson, for appellant.

L. T. Michener, Attorney General, *J. H. Gillett, J. E. McCullough, J. H. Miller, J. L. Bretz and J. C. Adams*, for the State.

COFFEY, J.—The appellant, Sylvester Grubb, was indicted in the Gibson Circuit Court for the murder of Gertrude Downey on the 13th day of September, 1888. A change of venue was granted and the cause was sent for trial to the Knox Circuit Court. In that court the appellant, by his counsel, filed a special plea, alleging that, at the time of the commission of the crime, the appellant was a person of unsound mind. The cause was tried, resulting in a verdict of guilty, fixing the death penalty. The appellant filed a motion and reasons for a new trial, which was overruled by the court, and an exception was reserved. The court then rendered judgment on the verdict, ordering that the appellant be executed on the 19th day of April, 1889.

After the argument in the cause had closed, and after the court had instructed the jury, the appellant asked the court to give the jury the following instruction:

"The defendant has not testified as a witness, in his own behalf, in this cause. It was competent for him to do so. This fact shall not be considered by you or commented upon by the jury in making your verdict."

The court refused to give this instruction, and the defend-

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ant excepted. It is claimed that in refusing to give this instruction the circuit court erred. Before passing upon this question, it is necessary to meet and decide a question raised by the State in relation to the bill of exceptions in this cause. It is claimed by the State that it does not affirmatively appear by the bill of exceptions, or otherwise, that all the instructions given by the court are in the record. If all the instructions given by the court do not appear in the record, this court will not consider the action of the circuit court in refusing to give an instruction asked, as it will be presumed that the court refused to give it, if it was the law applicable to the case, because it was embraced in some other instruction given. *Delhaney v. State*, 115 Ind. 499; *Walker v. State*, 102 Ind. 502; *Nat'l Ben. Ass'n v. Grauman*, 107 Ind. 288; *Cline v. Lindsey*, 110 Ind. 337; *Stephenson v. State*, 110 Ind. 358.

In the case of *Delhaney v. State*, *supra*, it affirmatively appeared by the record that all the instructions given by the court were not in the record. In this case there is no affirmative statement appearing in the record that the instructions therein set out were all the instructions given by the court. It does appear, however, that the court gave a number of instructions, which are signed by the judge, giving a statement of the law covering almost every phase of the case, and we think that, taking the entire record, it sufficiently appears that it contains all the instructions given by the court. The bill purports to contain all the instructions given. Having reached this conclusion, it remains to be determined as to whether the court, under the circumstances, erred in refusing to give the instruction above set out. No instruction embodying the law, as enunciated in this instruction, was given by the court.

The fourth division of section 1798, R. S. 1881, is as follows: "The defendant, to testify in his own behalf. But if the defendant do not testify, his failure to do so shall not be commented upon or referred to in the argument of the cause,

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nor commented upon, referred to, or in any manner considered by the jury trying the same; and it shall be the duty of the court, in such case, in its charge, to instruct the jury as to their duty under the provisions of this act."

The sixth division of section 1823, R. S. 1881, provides that "If the prosecuting attorney, the defendant or his counsel desire special instructions to be given to the jury, such instructions shall be reduced to writing, numbered and signed by the party or his attorney asking them, and delivered to the court before the commencement of the argument." * * *

Construing these provisions of our criminal code together, we are of the opinion that the court would not be required to instruct the jury as provided in section 1798, unless asked so to do.

As we have seen, in this case the court was not asked to give this instruction until after the argument in the cause had closed and the jury had been instructed.

This was too late. It should have been reduced to writing and delivered to the court before the argument commenced. *Foxwell v. State*, 63 Ind. 539; *Surber v. State*, 99 Ind. 71.

The court did not err in refusing to give the instruction as asked by the appellant.

Instruction numbered two, asked by defendant, is, we think, covered by instructions numbered thirteen and fifteen. Instruction thirteen informed the jury that when insanity is once shown to exist it is presumed to continue until the contrary is shown. The jury were told in instruction fifteen that if, on all the evidence in the cause, they entertained a reasonable doubt as to the sanity of the defendant, they should acquit him.

The court, in instruction numbered sixteen, instructed the jury, to the satisfaction of the defendant, upon the legal effect of the admission made by the State on his affidavit for a continuance.

A case will not be reversed for the refusal of the court to give an instruction asked if the instructions given by the

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court cover the essential elements of the law contained in that asked and refused. *Garfield v. State*, 74 Ind. 60; *Barnett v. State*, 100 Ind. 171; *Everson v. Seller*, 105 Ind. 266

Conceding, as the appellant does, in this court, that instruction sixteen, given by the court, states the law correctly, we are of the opinion that the essential principles of the law contained in all of the instructions asked by the appellant are fully covered by the instructions given by the court. The instructions bear evidence of having been carefully prepared, and state the law of the case plainly and concisely in such a manner that they could not have well been misunderstood by the jury. They cover every conceivable phase of the case as made by the evidence, and no tenable objection to them has been pointed out by the learned counsel in their able brief.

It appears by the record that during the progress of the trial, and while the court was engaged in hearing evidence upon the subject of the handwriting of a certain letter, at the close of which were written the words "*Syl, good-by*," the judge remarked, in the presence of the jury, and in their hearing, that he construed the signature to said letter, "*Syl, good-by*," to mean "*Good-by, Syl*," to which remark of the court, the defendant objected, and prayed the court to instruct the jury not to consider said remark, which the court refused to do, and the defendant excepted.

The letter was found in the drawer of the deceased after her death, in an envelope addressed:

"MISS GERTRUDE DOWNEY,
"Francisco,
"Gibson Co.,
"Ind."

(Post-marked) "Oakland City, Ind., Aug. 25th, 1888."

The letter contained threats against the deceased, and it was claimed by the State that it was in the handwriting of the defendant. It was in passing upon the admissibility of this letter as evidence in the cause that the judge made the remark above set out.

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It is claimed by the learned counsel for the defendant that inasmuch as the defendant resided at Oakland City, and as his christian name is Sylvester, that this remark had a tendency to injure his cause before the jury, and induced them to believe that he had written the letter.

The question of the admissibility of this letter in evidence was one wholly for the court to decide. Before it could be read in evidence there must have been sufficient evidence adduced to the judge of the court, either direct or circumstantial, to satisfy him that the defendant was its author. This principle is elementary and is familiar to the profession generally. The court, in determining the authorship of the letter, had the right to consider anything that appeared upon its face in connection with the other evidence bearing upon that question. We do not think that the court was required to instruct the jury that they should not consider the reasons given for the decision of a question which belonged exclusively to the court, in making up their verdict. In addition to what we have said on this subject, it is proper to state that the court did, in its instructions to the jury, tell them that they were the exclusive judges of both the law and the evidence.

It is urged that the court erred in admitting the evidence of one Davis as to the condition of the defendant's mind. It is claimed that the witness did not give the facts upon which he based his opinion, but it appears that the witness talked with the defendant ten or fifteen minutes on the day he says he was sane. The weight to be given to his testimony was a question for the jury, but he did give the facts upon which he based his opinion.

The same objection is made to the testimony of one Turpin, but it appears that the witness had known the defendant quite intimately for eight years. It is evident that the court as well as the jury understood that these witnesses were basing their opinions upon the facts stated by them. *Goodwin v. State*, 96 Ind. 550.

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During the closing argument, Mr. McCullough, one of the counsel for the State, said to the jury "that the defendant had made an affidavit for the continuance of said cause on account of the absence of four witnesses. We have admitted the facts he claimed these witnesses would have sworn to, in order to go to trial. If these four witnesses had been present, then it would have been four more. It is all a sham, and it is only done to delay justice."

The defendant, by his counsel, objected to these statements to the jury, and the court then instructed the jury that such statements were not to be considered by them.

Where counsel is guilty of misconduct, and the opposing party, at the time, objects, and the court, upon being asked to do so, neglects or refuses to take action in the matter, or to repair the injury to the satisfaction of the injured party, he can except and bring the question to this court. But in such cases, if the court does all in its power to relieve the party injured from the consequences of such misconduct, there is no action of the court to which an exception can be taken, and consequently nothing to be reviewed in this court. In such cases, if the injured party thinks that the injury is of such a character that it can not be repaired by any action of the court, he should move to set aside the jury, or take such other steps as he may think will secure to him a fair and impartial trial. If he fails to do this, and permits the case to proceed to final determination, he must be deemed to have waived all questions arising out of such misconduct. *Coleman v. State*, 111 Ind. 563; *Henning v. State*, 106 Ind. 386.

In this case, as the court did all that could be done, and, indeed, all it was asked by the appellant to do, it must be considered by this court that all error on account of the misconduct of counsel for the State has been waived.

The State propounded to Dr. J. H. Hensley, an expert witness called on its behalf, a hypothetical question covering what the State claimed to be the facts established by the evidence introduced by the prosecution on the subject of the

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insanity of the appellant. Basing his answer upon this hypothetical case, the witness stated that, in his opinion, the defendant was a person of sound mind at the time of the homicide under investigation.

The defendant, on cross-examination, attempted to introduce into the hypothetical case put by the State, facts which he claimed had been established by the evidence introduced by him. To this the court sustained an objection, and he excepted. This ruling of the court was erroneous. *Davis v. State*, 35 Ind. 496; *Batten v. State*, 80 Ind. 394.

Where a witness, examined as an expert, expresses an opinion based on facts assumed by the party introducing him to have been proved, or upon a hypothetical case put by such party, then the other party may cross-examine the witness by taking his opinion based on any other set of facts assumed by him to have been proved, or upon a hypothetical case.

But it is claimed by the State that as the defendant called this same witness in his own behalf, and examined him fully as to the matters excluded on cross-examination, this error was cured, and that the defendant was not injured by the erroneous ruling of the court in refusing to allow the defendant to prove the same matter on cross-examination.

It appears by the record that the defendant did call the witness in his own behalf, and prove by him the matters that would have been elicited by the questions put on the cross-examination. This, in our opinion, cured the error of the court above indicated, and rendered the ruling of the court harmless. *Ard v. State*, 114 Ind. 542.

At the proper time the defendant offered to prove by his father that, at the time one of his brothers died, he was, and for a long time prior to his death had been, insane, but the court refused to allow the witness to answer the question calculated to elicit that fact.

It was not shown that the witness was an expert, nor did the witness state any facts upon which he could base an opinion that his brother was insane. Insanity is a fact that can

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not be proven by reputation, nor can it be proven by a witness who is not an expert, unless the witness first gives the facts upon which his opinion is based. *Walker v. State*, 102 Ind. 502; *Sutherland v. Hankins*, 56 Ind. 343.

This disposes of all the questions urged by the able counsel in their brief for a reversal of the judgment of the circuit court.

Impressed with the weight of the responsibility resting upon us, and with a full appreciation of the awful consequences that may follow our determination of the questions involved in this case, we have examined the record with a solicitude known only to those whose duty it has been to perform similar duties. In this examination we have been aided by able and elaborate briefs for both the appellant and the appellee. In our opinion nothing can be found in this record from which it can be inferred that the appellant did not have a fair and impartial trial in the circuit court. We do not think that there is any legal ground for reversing the judgment of the court below.

Judgment affirmed.

Filed Feb. 16, 1889.

ON PETITION FOR A REHEARING.

COFFEY, J.—The appellant in this cause has filed a petition for a rehearing, and in the able brief filed by his counsel it is earnestly insisted that this court erred in its conclusions in the opinion heretofore rendered.

The appellant, at the proper time, asked the court to instruct the jury that "The law presumes that a man is of sound mind until there is some evidence to the contrary. In prosecutions for offences against the criminal code, an accused is entitled to an acquittal if the evidence engenders a reasonable doubt as to the mental capacity at the time the alleged offence is committed. Evidence rebutting, or tending to rebut, the presumption of sanity, need not, to entitle the defendant to an acquittal, preponderate in favor of the

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accused. It will be sufficient if it raise in your minds a reasonable doubt. And if shown defendant was a person of unsound mind less than a week before said offence was committed, it is presumed he continued so, and unless the State has shown beyond a reasonable doubt he was sane at that time, you should acquit the defendant."

The court refused to give this instruction, but instructed the jury as follows :

" 13. Insanity, when once shown to exist in an individual, is presumed to continue, until the contrary is shown by the evidence."

" 15. On the issue formed by the defendant's special plea, and the reply thereto, hereinbefore referred to, the burden is upon the defendant to overcome the legal presumption of sanity by some evidence ; but, under the law of this State, the defendant would be entitled to an acquittal at your hands under his special plea, if the evidence adduced is sufficient to raise a reasonable doubt in your minds as to whether he was of sound or unsound mind at the time the alleged offence is charged to have been committed. And evidence rebutting, or tending to rebut, the presumption of sanity, need not, to entitle the defendant to acquittal, preponderate in his favor. In that respect it will be sufficient if it create in your minds a reasonable doubt."

" 31. * * * If you entertain a reasonable doubt as to whether he was criminally responsible for the commission of the acts charged in the indictment, if you are satisfied, on the evidence, beyond a reasonable doubt, that he did commit the act charged, you should find him not guilty."

As was said in the opinion in this cause, a case will not be reversed for the refusal of the court to give an instruction asked, if instructions given by the court cover the essential elements of the law contained in that asked and refused. The essential elements of the law contained in the instruction asked, as above set out, are that the jury, if they find that there is any evidence in the cause tending to prove that

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the appellant, at a time prior to the commission of the offence charged, was insane, they must acquit him, unless satisfied beyond a reasonable doubt of his sanity at the time of the offence. This element is clearly set forth in the instructions given.

Instructions are not to be construed in detached portions, but they must be construed together, and when so construed the jury must have understood that if they entertained a reasonable doubt of the sanity of the appellant at the time of the homicide charged, it was their duty to acquit him.

It is earnestly insisted that instruction thirteen, above set out, is erroneous, because the court did not add thereto the words "beyond a reasonable doubt."

We do not think so. It was the announcement of a general principle of law, applicable alike to insanity once shown to exist, as to all other things. When a thing is once shown to exist it is presumed to exist always, with some exceptions, until the contrary is shown. It is true that the jury should have been informed, either in that instruction or in some other, that a bare preponderance of the evidence was not sufficient to remove that presumption in a criminal case, but they were so told, in substance, in instruction numbered fifteen. *Physio-Medical College v. Wilkinson*, 108 Ind. 314.

With the other instruction given by the court upon the subject of the presumption of innocence, what we have said here fully covers all the essential elements of the law contained in instructions numbered two, three, four and five, asked by the appellant.

The appellant also asked the court to instruct the jury that "There are but two classes of persons under the law of this State; those of sound and unsound mind, and a person of unsound mind can not be held responsible for crime under the criminal law; the law makes no distinction in degrees of unsoundness of mind."

The court refused to give this instruction, and gave the following:

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"17. * * * If he (defendant) was laboring under an irresistible, uncontrollable mental delusion, impelling him to do said act, that he was at the time of the perpetration of said killing in such a state of mind as to be unable to control his will and his actions in regard to the act so committed, in judgment of law he was insane. * * * *

"18. If, at the time of committing the act charged, the defendant was moved thereto by an insane impulse controlling his will and his judgment, an impulse too powerful for him to resist, and said insane impulse arose from causes, physical or moral, or from both combined, not voluntary or induced by himself, you can not find him guilty."

"10. * * * If the party committing the offence had mental capacity sufficient to adequately comprehend the nature and consequences of the act, and had unimpaired will power fully sufficient to control an insane impulse to commit crime, he would be, under the law, responsible for his acts."

It is true that the law recognizes but two classes, the sane and the insane, and that an insane person is not liable, criminally, for his acts, but the instruction asked, without any explanation to the jury as to what constituted insanity within the meaning of the law, was calculated to mislead them. The instructions above set out, we think, correctly stated the law as it has heretofore been enunciated by this court. *Robinson v. State*, 113 Ind. 510; *Warner v. State*, 114 Ind. 137; *Wartena v. State*, 105 Ind. 445.

Instructions seven and eight, asked by the appellant, are fully covered by the instructions given by the court. It is true that the court does not use the exact language embodied in these instructions, but the principles of law contained therein were fully stated to the jury.

Instruction eleven and one-half, asked by the appellant, upon the subject of good character, is fully covered by instruction numbered twenty-nine, given by the court. In the instruction given by the court the jury were expressly told that they

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might consider evidence of the appellant's good character as bearing upon the question of guilt or innocence and upon the question of the soundness or unsoundness of his mind.

The appellant also asked the court at the proper time to give the jury the following instruction: "Insanity is recognized as a disease which may impair or totally destroy either the understanding or the will, or both; and this disease sometimes takes the form of an irresistible desire to take human life, and when it does, the mind under such conditions, while it may clearly perceive and comprehend the results and consequences arising from such act, is incapable of resistance, and if you find the defendant was thus afflicted when said alleged offence was committed, then you should acquit him."

So far as this instruction contains the law, it is covered by instruction number eleven given by the court. But the instruction as asked contains matters of fact which should not be embodied in an instruction. It is probably a fact that insanity "sometimes takes the form of an irresistible desire to take human life," but we do not know it as a matter of law.

In the case of *Bradley v. State*, 31 Ind. 492 (509), the learned judge who delivered the opinion says: "Insanity is a disease. * * It is no more the province of the court to instruct a jury as to the effect this disease will produce in a special subject, than as to the result of an attack of cholera or fever. The effect which has been produced is a question of fact, and to be proved in like manner."

The other reasons urged for a rehearing relate to matters which were fully considered and decided in the opinion heretofore announced in the case. We have again reviewed all these questions and feel warranted in saying that they were correctly decided. We are unable to find in the record any reason for granting a rehearing.

Petition overruled.

Filed April 2, 1889.

VOL. 117.—19

West et al. v. Hayes et al.

No. 12,254.

WEST ET AL. v. HAYES ET AL.

MORTGAGE.—*Deed Absolute on Face.*—*Finding of Trial Court.*—A finding by the trial court that a deed, absolute on its face, was given merely as a mortgage to indemnify the grantee against loss as surety for the grantor, will not be reviewed on appeal if there is evidence tending to support it. **SAME.**—*To Indemnify Surety.*—*Appeal Bond.*—*Taxes Paid by Mortgagee Pending Appeal.*—Where a person executes a mortgage to indemnify a surety on an appeal bond, the mortgagee, although he suffers no other loss, is entitled to enforce the lien of the mortgage to the extent of taxes paid by him on the real estate pending the appeal.

From the Ohio Circuit Court.

J. K. Thompson, G. M. Roberts and C. W. Stapp, for appellants.

W. N. Hauck, for appellees.

OLDS, J.—This action was brought by the appellants against the appellees to have a deed declared a mortgage and for foreclosure of the same.

On March 30th, 1880, appellees Hayes and Hayes, husband and wife, executed to appellants a deed absolute on its face. Appellant Harding was then liable for Mr. Hayes on an appeal bond in the case of *Morgan v. Hayes*, from the Dearborn Circuit Court, in the sum of \$4,500. On the 24th day of April, 1880, both of appellants became liable for Mr. Hayes on an appeal bond in the case of *Burkam v. Hayes*, filed in the Ohio Circuit Court, for \$12,500. In June, 1880, appellants, Harding and West, became liable for Hayes on his bond as executor of the will of Joseph Hayes, deceased, filed in the Dearborn Circuit Court, in the sum of \$50,000. Mr. Hayes made default, as executor, in the sum of \$1,848.27, and judgment on the bond was rendered therefor, and costs, in the Ohio Circuit Court, on the 21st day of June, 1883. The defendants, other than Mr. and Mrs. Hayes, held judg-

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ments against Mr. Hayes and were made parties for that reason, but stood on their judgments as rendered, and took no judgments in this case.

The contention of the appellees in the case was, that the deed was made to indemnify the sureties on the Burkam appeal bond only, and as that case was reversed in the Supreme Court, the deed as a mortgage was satisfied.

There was a finding by the court that the deed was given as an indemnity against loss by reason of appellants' becoming sureties on the Burkam appeal bond, that the appeal was perfected and the cause reversed by the Supreme Court of Indiana, and afterwards dismissed by Burkam, and that there was no other consideration. A motion for a new trial was filed by appellants and overruled, and judgment was rendered for the cancellation of the mortgage. The court also found there was due Harding \$260.41, and due West \$623, waiving relief from valuation laws, and \$70.31 subject to appraisalment, and rendered judgment accordingly.

It is contended by appellants that as the evidence shows there were taxes and insurance paid by them upon the property while they still held the deed, and that it was understood between appellants and Mr. Hayes that this deed was given as an indemnity to secure appellants against all liability that they were incurring as sureties for Hayes, the finding of the court was not supported by the evidence.

It is also contended that as Harding was not present when the deed was delivered by Hayes to West and when West delivered the deed to Harding, that when West delivered the deed to Harding there was nothing said limiting the deed to the indemnity for the one bond, and he acted upon it and became surety on other bonds, on the theory that it was an indemnity against loss by reason of any liability he might incur on account of becoming surety for Mr. Hayes, that, therefore, Harding can recover for any loss incurred by reason of being surety, and for taxes and insurance on the property.

The contest in this case on the trial was as to what the deed

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was given to indemnify against, and the court found that it was given as an indemnity against loss by reason of becoming surety on the Burkam appeal bond, and for no other consideration.

There is evidence in the record from which such a finding could be made, and, therefore, under the well settled rule of this court that a cause will not be reversed on the weight of the evidence, that question is settled.

The finding of the court is conclusive on the question of the consideration of the mortgage, and it is a finding that it was not given as an indemnity against any other liability except the Burkam appeal bond; but there remains the question as to whether any of the amounts, the payments of which by the appellants are not controverted, were incurred by reason of being surety on the Burkam appeal bond; if so, the finding and judgment is erroneous.

The item of \$127.28, paid by appellants for taxes on the real estate described in the mortgage, was paid on the 3d day of March, 1884, while the Burkam case was pending in the Supreme Court. The Burkam case was reversed on the 1st day of April, 1884. During the time the mortgage remained in force and unsatisfied, the appellants had the right to pay the taxes on the real estate, and collect the same as a part of the mortgage debt, and to have it included in the mortgage lien.

We find no evidence in the record disputing the payment of the taxes or the date of payment. The taxes being paid before the reversal of the Burkam judgment, and the amount paid becoming a part of the mortgage debt, the reversal only satisfied the debt to the amount of the bond, and appellants were entitled to have a foreclosure of mortgage to satisfy their claim for taxes. See section 6451, R. S. 1881. *Se-mans v. Harvey*, 52 Ind. 331.

The finding of the court that the mortgage was satisfied was contrary to the undisputed evidence in the case, and the

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court erred in overruling the motion for a new trial, and for this reason the judgment must be reversed.

Judgment reversed, with costs, and instructions to the court below to sustain the motion for a new trial, and for further proceedings not inconsistent with this opinion.

Filed Feb. 12, 1889.

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No. 13,550.

ROBINSON ET AL. v. HUGHES.

EXEMPTION FROM EXECUTION.—*Becoming a Householder After Levy.*—*Right to Claim Exemption.*—A judgment was obtained against an unmarried man, who was not a householder. His property was levied upon under an execution issued on the judgment, and advertised for sale. Between the date of the levy and the date fixed for the sale, the debtor married and became a *bona fide* householder, and claimed the property, which was of less value than six hundred dollars, as exempt.

Held, that the exemption should have been allowed, and its denial entitled the debtor to enjoin the sale.

From the Howard Circuit Court.

J. C. Blacklidge, W. E. Blacklidge and B. C. Moon, for appellants.

J. F. Morrison, R. Vaile, F. Cooper and A. Shewmon, for appellee.

COFFEY, J.—On the 13th day of November, 1885, the appellants, Robinson and Robinson, recovered a judgment in the Howard Circuit Court, on a promissory note, against the appellee for the sum of \$182.05. An execution was issued by the clerk of said court on said judgment and placed in the hands of the defendant, McReynolds, who at the time was the

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sheriff of Howard county. The execution was duly levied upon the property of the appellee by said sheriff and was by him advertised for sale.

At the time said judgment was rendered, and at the time the property of the appellee was levied upon and advertised for sale, the appellee was single and was not a householder, but between the date of levy and the date fixed for sale, he married and became a *bona fide* resident householder of the State of Indiana. He tendered to said sheriff the statutory schedule, duly verified, and demanded that his property be set off to him as exempt from execution and sale, the same being of less value than \$600.

The sheriff refusing to comply with such demand, this action was brought to enjoin the sheriff from selling said property.

The court below held that the appellee was entitled to claim his property as exempt from levy and sale on said judgment and execution, and granted the injunction as prayed. From this ruling the defendants in said action appealed to this court, and by proper assignment of errors call in question the ruling of the court below.

It is contended by the appellants that, by virtue of the levy, they acquired a specific lien on the property of the appellee and the right to sell it in satisfaction of their debt, and that the appellee could not by any act of his divest such lien.

On the other hand, it is contended by the appellee that the exemption law is not for the benefit of the debtor, but that it is for the benefit of those dependent upon him for support and sustenance, and that the debtor, for their benefit, has the right at any time before sale to claim the property as exempt from execution and sale, without regard to the time when he became a *bona fide* resident householder of the State.

In some of the States it is held that the right to exemption can not be created after the rights of creditors have vested. *Bowker v. Collins*, 4 Neb. 494; *Elston v. Robinson*,

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21 Iowa, 531; *Reinbach v. Walter*, 27 Ill. 393; *Symonds v. Lappin*, 82 Ill. 213; *Thompson v. Pickel*, 20 Iowa, 490; *Hale v. Heaslip*, 16 Iowa, 451; *Bullene v. Hiatt*, 12 Kan. 98; *Robinson v. Wilson*, 15 Kan. 595; *Rix v. McHenry*, 7 Cal. 89; *Mills v. Spaulding*, 50 Maine, 57; *Upman v. Second Ward Bank*, 15 Wis. 450.

It is held in some of the other States of the Union that the marriage of the execution defendant after levy confers upon him the right to claim the benefit of the exemption laws. 1 Freeman Executions, section 222; *Watson v. Simpson*, 5 Ala. 233; Thompson Home. and Exemp., section 319; *Irwin v. Lewis*, 50 Miss. 363; *Trotter v. Dobbs*, 38 Miss. 198; *Letchford v. Cary*, 52 Miss. 791; *Stone v. Darnell*, 20 Texas, 11; *Macmanus v. Campbell*, 37 Texas, 267.

An examination of these authorities will reveal the fact that the question always depends upon the construction to be given to the numerous statutes upon the subject of exemption, all in some respects differing. The precise question here involved has never, to our knowledge, been decided by this court, but its solution must, of necessity, depend upon the proper construction of our statute providing for the exemption of property from levy and sale on execution.

The right to have a reasonable amount of property exempt from execution is a constitutional right, secured to every *bona fide* resident householder of the State. As the quantity to be exempted is not fixed by the Constitution, it follows that it must be fixed by the Legislature. It has been fixed by law at \$600. This law must be liberally construed. *Astley v. Capron*, 89 Ind. 167; *Butner v. Bowser*, 104 Ind. 255.

The debtor is entitled to select the property he desires to exempt from execution and sale, and he may file his schedule and make such selection at any time before sale. *Pate v. Swann*, 7 Blackf. 500; *Eltzroth v. Webster*, 15 Ind. 21; *State, ex rel., v. Read*, 94 Ind. 103.

The contention of the appellants that because the levy

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in this case satisfied the execution, they are, therefore, entitled to sell the property, can not be maintained. No such conclusion necessarily follows from the premises. Where a debtor owns more than \$600 worth of property a levy satisfies the execution to the same extent it is satisfied in this case, and yet it is fully settled by the above authorities that he may file his schedule and exempt the property levied upon from sale at any time before the sale is actually made, and leave the sheriff free to make a new levy. So in this case, if the property levied on is set off to the appellee under his claim to have it exempt from execution, it will be the duty of the sheriff to return his writ unsatisfied, leaving the appellants free to sue out another execution on their judgment at any time.

Our statute, in terms, secures to every *bona fide* resident householder of the State \$600 worth of property as exempt from execution, and our opinion is, that the appellee in this case, coming as he does within the terms of the statute, is entitled to claim his property as exempt from execution. To hold otherwise would be to create an exception, which the Legislature did not in terms declare, and one which we do not feel warranted in creating by construction.

We do not think that the circuit court erred in granting the injunction sought by the appellee.

Judgment affirmed.

Filed Feb. 12, 1889.

Stults *et al.* v. Zahn.

117 297
125 244

No. 13,460.

STULTS ET AL. v. ZAHN.

APPEAL BOND.—Landlord and Tenant.—Accruing Rents.—Liability of Obligors.

—A bond executed in taking an appeal from a judgment of a justice of the peace awarding the plaintiff the possession of real estate and damages for its detention, covers rents accruing pending the appeal, whether it purports to do so or not (sections 5236 and 1221, R. S. 1881); and the fact that the appeal is dismissed in the circuit court, without a judgment being taken, does not affect the liability of the obligors.

From the Huntington Circuit Court.

B. M. Cobb and *C. W. Watkins*, for appellants.

B. F. Ibach and *J. G. Ibach*, for appellee.

MITCHELL, J.—This was an action by Catharine Zahn against Stults and Meech, to recover damages upon an appeal bond executed by the defendants in order to perfect an appeal taken by Stults from the judgment of a justice of the peace to the circuit court of Huntington county, in a suit wherein Mrs. Zahn was the plaintiff and Stults defendant. By the judgment of the justice the plaintiff was awarded the possession of certain real estate which Stults occupied as her tenant, and also thirty dollars, besides her costs, as damages.

The appeal was taken on the 2d day of April, 1884, to the circuit court, and on the 7th day of the following November appellant Stults was called and defaulted, and his appeal dismissed. The proceedings had in the circuit court were duly certified to the justice of the peace. Stults occupied the leased premises pending the appeal to the circuit court. The only question made on this appeal relates to the amount of damages recoverable on the appeal bond, in view of the facts above recited.

On the appellants' behalf it is contended that the dismissal of the appeal was equivalent to the rendition of a judgment against Stults for thirty dollars and costs, and that the amount

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of the judgment recovered before the justice of the peace, with interest thereon, was the full measure of their liability on an appeal bond which stipulated that Stults should duly prosecute his appeal, and abide by and pay any judgment and costs which should be rendered against him. Hence, it is argued, the court below erred in including in the amount of damages assessed the rents which accrued pending the appeal. This position is not maintainable. We have no doubt but that the plaintiff might have had the amount of damages for the detention of the premises estimated up to the time the case was disposed of in the circuit court, and that, if the appeal was so far perfected as to give the court jurisdiction, a judgment might properly have been entered in that court for the whole amount, including rents which accrued pending the appeal. Had this been done, the judgment rendered would doubtless have been conclusive on all the parties concerned. That the case was dismissed without taking judgment, did not, however, adjudicate anything, nor did it in any way affect the liability of the parties to the appeal bond, which, by the express terms of the statute, section 5236, covers damages for rents accruing pending the appeal. It is of no consequence that the bond did not by its terms purport to cover the accruing rents. The parties must be held to have contracted with reference to the statute, the provisions of which became as much a part of the bond as if they had been expressly incorporated into it. Under section 1221, R. S. 1881, the parties became bound to the full extent contemplated by the statute requiring the bond. *Stanley v. Dailey*, 112 Ind. 489; *Graeter v. De Wolf*, 112 Ind. 1; *Opp v. TenEyck*, 99 Ind. 345; *Jones v. Droneberger*, 23 Ind. 74; *State, ex rel., v. Britton*, 102 Ind. 214.

We do not know why the appeal was dismissed, nor is it important to inquire. It is enough to know that an appeal had been taken, by filing the bond sued on, and that Stults retained possession of the leasehold pending the appeal. He failed to prosecute his appeal, and suffered it to be dismissed

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after it had accomplished his purpose, as we must assume. He and his surety on the bond thereby became liable for the judgment and also for the damages pending the appeal.

The judgment below was for one hundred dollars. An examination of the record shows that there is evidence tending to support the finding and judgment.

The judgment is therefore affirmed, with costs.

Filed Feb. 12, 1889.

117	299
122	312
117	299
149	512
152	630

No. 13,596.

EMERY ET AL. v. ROYAL.

JUSTICE OF THE PEACE.—Judgment.—The conclusion of a justice of the peace in a case tried before him is not a judgment until it is entered of record.

SAME.—Attachment.—Judgment Against Garnishee.—If the only judgment rendered against an attachment defendant is a personal one, the garnishee defendant must be discharged, and any judgment against him is void.

SAME.—Payment of Money by Garnishee.—Negligence.—It is the duty of a garnishee defendant before paying money to know that a proper judgment has been rendered; and if through his negligence he sustains loss, he must bear it.

SAME.—Illiterate Person.—Examination of Records.—Reasonable diligence requires that a person who can not read shall procure one who can read to examine the record to ascertain whether or not a judgment has been rendered against him.

COMPROMISE.—Nudum Pactum.—Where a compromise is agreed upon, and one party agrees to pay the other a certain sum in satisfaction of a claim which the latter is making against the former, there must be some foundation for the claim, or the agreement is a *nudum pactum*, and not enforceable.

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SAME.—Garnishment.—Justice of Peace.—Liability on Bond.—Where one summoned as a garnishee in a proceeding before a justice of the peace, assuming that a judgment has been rendered against him, when in fact there is none, voluntarily pays to the justice the amount of a promissory note which he owes to the principal defendant, and afterwards has to pay the amount of the note to an assignee thereof, in the absence of fraud he has no cause of action upon the justice's bond, and a compromise agreement made by the justice and his sureties to repay him the amount recovered by the assignee is without consideration, and not enforceable.

From the Greene Circuit Court.

J. D. Alexander, H. W. Letsinger, A. G. Cavins, E. H. C. Cavins and W. L. Cavins, for appellants.

W. W. Moffett and C. E. Davis, for appellee.

BERKSHIRE, J.—The appellee recovered judgment in the court below for \$90.50.

There are several errors assigned.

The first and only one which we shall consider is, that the court erred in overruling the demurrer to the complaint. The complaint is in two paragraphs.

The following is the substance of the first paragraph: The appellant Emery was a justice of the peace in Jackson township, Greene county, Indiana, and the other appellants sureties on his official bond; that an action was commenced by one Dukes against one Hamblin before said justice, together with attachment proceedings, and that the appellee and one Fry were summoned as garnishees; that such proceedings were had before said justice that, on the 5th day of July, 1881, judgment was rendered against said Hamblin for \$37 and costs, in all \$50, and against the appellee and Fry for \$51; that the judgment against appellee and Fry was upon a note which they had executed to one Crow, and which the said justice in said action determined to be the property of the said Hamblin; that the appellee was the principal in said note and Fry his surety; that, as principal, he paid the said judgment in full against Fry and himself to said justice;

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that said justice wholly failed to enter the said judgment against appellee and Fry upon his docket, and the evidence thereof was not preserved for appellee's protection ; that the said note afterwards came into the hands of a firm known as McKee Bros., who brought suit thereon against the appellee and said Fry ; that the appellee, being unable to read writing, was ignorant of the fact that said judgment had not been recorded ; that because of the failure of said justice to make a record of said judgment so rendered against the appellee, he was without evidence thereof, and because of such want of evidence the McKees recovered a judgment against him for \$72, including costs, and he was compelled to pay \$20 attorney fees in defence of said action ; that he notified the appellants that he intended to sue them upon the official bond of said justice because of said breach of duty by the said justice, unless speedy compensation was made to him ; that the appellants asked for time to consider the matter before deciding as to what they would do, to which the appellee assented ; that afterwards the appellants notified the appellee that they had had a consultation, and taken the advice of counsel, and were willing to pay to him an amount equal to the judgment, including costs, recovered by the McKees, and \$15 of the amount expended by him in the employment of counsel to defend said action, in all \$92.50, if he would abandon his right of action on said bond and refrain from bringing suit ; that he accepted said proposition, abandoned his right of action, and did not institute said suit.

The second paragraph is substantially like the first, with some additional allegations. It alleges that the said justice informed the appellee that he had rendered judgment against said Hamblin, Fry and the appellee, in favor of said Dukes, for the full amount of said note—\$51 ; that in this statement the said justice made a mistake ; that he had rendered no judgment against the appellee and Fry ; that the appellee being unable to read, and knowing that the said justice usually entered his judgments on his docket, did not examine

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the same, but relied on what the justice told him, and, acting upon the mistaken impression thus formed, and being the principal in the said note, paid to the said justice for said Dukes, on said supposed judgment, said sum of \$51, on the — day of September, 1881, and that said justice, acting under the impression that he had rendered said judgment, accepted and received said money as payment on said supposed judgment; that the appellee did not discover that said judgment had not been recorded until after the McKees sued him on said note, in which action they recovered a judgment against him, which, together with his attorney's fees, amounted to \$94.

The demurrer is not separate to each paragraph, but is a demurrer to the whole complaint, the cause of demurrer being that the complaint does not state facts sufficient to constitute a cause of action.

In this instance the form of the demurrer does not become material, because if one paragraph of the complaint is bad the other is necessarily so.

This action is not brought on the official bond of the justice, but is grounded upon an agreement of compromise which it is claimed the parties entered into.

The first question that presents itself is, whether the allegations of the complaint show the appellee to have been the holder of such a claim or demand, the release or abandonment of which afforded to the appellants a valuable consideration for the obligation which it is averred they entered into; if not, then the complaint was bad, and the court should have sustained the demurrer thereto.

Justices courts are courts of limited and inferior jurisdiction; this is well settled in Indiana, and probably in all of the other States. In Indiana they have only such jurisdiction as the statute gives to them, and in each case facts necessary to jurisdiction must affirmatively appear. *Newman v. Manning*, 89 Ind. 422; *Wilkinson v. Moore*, 79 Ind. 397; *Hopper v. Lucas*, 86 Ind. 43; *Doctor v. Hartman*, 74 Ind. 221; *Rich-*

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ards v. Reed, 39 Ind. 330; *Ohio, etc., R. R. Co. v. Hanna*, 16 Ind. 391; *Willey v. Strickland*, 8 Ind. 453; *Hollingsworth v. Stone*, 90 Ind. 244.

Section 1489, R. S. 1881, reads as follows: "When a suit shall be dismissed, judgment confessed, the verdict of a jury returned, or the defendant be in actual custody, judgment shall be entered and signed immediately; in all other cases judgment shall be entered and signed within four days after the trial."

It is only by his record that the justice speaks; he may announce his conclusion, but until that conclusion is entered upon his docket and his signature affixed thereto, there is no judgment. *Board, etc., v. Cutter*, 7 Ind. 6; *Rugle v. Weston*, 23 Ind. 588; *Galbraith v. Sidener*, 28 Ind. 142.

The complaint alleges that Justice Emery rendered a judgment against the appellee and Fry as garnishees but failed to record it. The allegation is self-destructive.

The averments in the complaint disclose the fact that the justice did not render a judgment against Fry and the appellee. And the facts as disclosed by the complaint further show, that had the justice rendered a judgment against the garnishees, his action would have been without authority of law and void.

Section 936, R. S. 1881, reads as follows: "Final judgment shall not be rendered against the garnishee until the action against the defendant in attachment is determined; and if the plaintiff fails to recover judgment either against the defendant or the garnishee, the garnishee shall be discharged and recover his costs."

From our understanding of the complaint, there was no judgment rendered by the justice in the attachment proceedings against the principal defendant.

As we understand the first paragraph of the complaint, the judgment that was rendered against Hamblin was a personal judgment.

And the averment in the second paragraph is to the effect

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that the justice informed the appellee that he had rendered a personal judgment against all—that is, Hamblin, Fry and the appellee.

The rendition of a personal judgment against Hamblin, the principal defendant, without a judgment in the proceedings in attachment, was equivalent to a dismissal of the attachment proceedings. *Lowry v. McGee*, 75 Ind. 508; *Smith v. Scott*, 86 Ind. 346; *Wright v. Manns*, 111 Ind. 422.

After rendering the personal judgment against Hamblin, the justice had but one thing else to do, and that was to render a judgment discharging the garnishees and that they recover costs. If he did anything else, his proceedings were void for want of jurisdiction.

It was incumbent on the appellee before paying money to the justice to fully inform himself as to the kind of judgment which had been rendered against Hamblin, the principal defendant, and it is nowhere averred that he did not know. *Richardson v. Hickman*, 22 Ind. 244; *Schoppenhast v. Bollman*, 21 Ind. 280.

The appellee was bound to know the law, and to know, therefore, that if there was a personal judgment only against the principal defendant, there could be no valid judgment against him as garnishee.

But independent of the result as to the principal defendant, appellee was bound to know for himself that the proceedings were regular as to him and that a proper judgment had been rendered. *Harmon v. Birchard*, 8 Blackf. 418; *Newman v. Manning*, 89 Ind. 422; *Toledo, etc., R. W. Co. v. McNulty*, 34 Ind. 531.

The appellee having suffered loss because of a want of information as to a matter about which it was his duty to be informed, the loss sustained must be attributed to his own negligence, and he himself must bear it, unless some legal excuse is shown for his lack of information.

The complaint does not allege any legal excuse.

The facts alleged in the complaint do not amount to a

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fraud, and no other excuse is suggested. It is true there is an allegation in the complaint that the justice informed the appellee that he had rendered a judgment against him, and that the appellee could not read, and relied on what the justice said to him, but this of itself comes far short of a fraud. Every misrepresentation or false statement does not constitute a fraud.

The law requires of every person the exercise of reasonable care and diligence in the ordinary affairs of life, and, failing in this, if loss ensues, he himself must bear it, and not another. *Dutton v. Clapper*, 53 Ind. 276; *Clodfelter v. Hulett*, 72 Ind. 137.

The use of reasonable diligence required that the appellee command the services of some one who could read to examine the justice's docket for him, and if the circumstances were such as to prevent him from so doing, the complaint should have alleged the circumstances.

There is no averment in the complaint that the appellee asked the justice to read from his docket and that the justice refused; nor is it averred that the justice knew of the appellee's inability to read, and purposely deceived him.

All adjustments by way of compromise must, like all other agreements, rest upon a valuable consideration or they can not be enforced.

Where a compromise is agreed upon, and one party agrees to pay the other a certain sum of money in satisfaction of a claim or demand which the latter is making against the former, there must be some foundation for the claim or demand, otherwise the agreement to pay will be a *nudum pactum*; not that there must be an unquestioned legal right, because in that event there would be no occasion to compromise; the claim or demand must be one the enforcement of which in the courts is doubtful. *Jarvis v. Sutton*, 3 Ind. 289; *Schnell v. Nell*, 17 Ind. 29; *Spahr v. Hollingshead*, 8 Blackf. 415; *Smith v. Boruff*, 75 Ind. 412; *Coy v. Stucker*, 31 Ind. 161;

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Kidder v. Blake, 45 N. H. 530 ; *Pitkin v. Noyes*, 48 N. H. 294 ; *North v. Forest*, 15 Conn. 400 ; *Anthony v. Boyd*, 8 Atl. Rep. 701 ; *Emmitsburgh R. R. Co. v. Donoghue*, 67 Md. 383 ; *Demars v. Musser-Sauntry Land Co.*, 37 Minn. 418.

The claim or demand made by the appellee had no foundation to rest upon, either in fact or in law. The payment which he made to the justice was a voluntary payment. There was no writ or other process against his property, and, so far as the complaint shows, no one was even asking payment of him. *Toledo, etc., R. W. Co. v. McNulty*, *supra* ; *Richardson v. Hickman*, 22 Ind. 244 ; *Drake Attachment*, section 711.

The litigation with the McKees was because of the failure of the appellee to pay to them what was justly their due, and which should have been paid without suit.

The payment made by the appellee was not the result of mistake, either on his part or that of the justice ; the appellee intended to pay, and the justice intended to receive, the money.

We do not mean to be understood as intimating that, under any circumstances, a justice of the peace would be liable on his official bond on account of a false representation. We have not considered that question, as it does not become necessary in this case.

The facts stated in the complaint do not constitute a cause of action.

The judgment is reversed, with costs, and the court below directed to sustain the demurrer to the complaint.

Filed Feb. 12, 1889.

The State, *ex rel.* Lowery, *v.* Davis *et al.*

No. 13,444.

THE STATE, EX REL. LOWERY, *v.* DAVIS ET AL.

EVIDENCE.—*Deed.*—*Secondary Evidence of Contents.*—A proper foundation must be laid before secondary evidence of the contents of a deed is admissible.

COUNTY RECORDER.—*Negligence.*—*Nominal Damages.*—A recorder of deeds who is guilty of a breach of duty is liable only for nominal damages, unless the plaintiff proves an actual loss.

SAME.—*Liability to Lien-Holder.*—Where a recorder negligently so records a deed, reserving a lien, as to make the amount of the lien two hundred dollars when it should be five hundred, he is not liable beyond nominal damages, unless the plaintiff proves that he can not collect the full amount of the lien from the person who assumed its payment.

From the Madison Circuit Court.

M. A. Chipman, for appellant.

C. L. Henry and *H. C. Ryan*, for appellees.

ELLIOTT, C. J.—This case is here for the second time. *State, ex rel., v. Davis*, 96 Ind. 539. The present appeal brings before us the ruling of the trial court denying a new trial.

The appellant offered evidence of the contents of a deed, but at the time the evidence was offered no foundation had been laid for the introduction of secondary evidence. There was, therefore, no error in excluding the offered testimony.

The jury returned a verdict in favor of the relator for one dollar, and his counsel insists that this finding decides all questions in his favor, and that, consequently, the assessment of the amount of recovery should have been at least three hundred dollars. We can not accept this theory. The recorder who is guilty of a breach of duty is only liable for nominal damages, unless the plaintiff proves an actual loss. It is quite clear, therefore, that a verdict for nominal damages does not necessarily decide all material questions in

117	307
194	99

117	307
160	158

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favor of the plaintiff, for, on the contrary, it really decides that he suffered nothing more than a nominal injury.

A plaintiff can not recover of a recorder, and the sureties on his official bond, more than nominal damages, unless he proves an actual loss, and to prove this he must show, in such a case as this, that he could not have collected the amount of his lien from the party who assumed to pay it. In other words, where a recorder negligently so records a deed, reserving a lien, as to make the amount of the lien two hundred dollars when it should be five hundred, he is not liable beyond nominal damages, unless the plaintiff proves that he can not collect the full amount of the lien from the person who assumed its payment. If the person who undertook to pay remains liable and solvent, then the money must be collected from him and not from the recorder and his sureties.

Judgment affirmed.

Filed Feb. 13, 1889.

117	308
124	39
194	374
117	308
131	285
117	308
139	587

No. 13,549.

UNDERWOOD ET AL. v. ROBBINS ET AL.

WILL.—*Term "Legal Heirs."*—*When Construed to Mean "Child or Children."*

—The term "legal heirs" will be construed to mean "child or children" when it clearly appears from the will that the testator used it in that sense.

SAME.—*Will Construed.*—*Descent.*—*Kin of the Half-Blood.*—A testator bequeathed to his daughter a sum of money, directing that it be put at interest and the principal paid to her when she became twenty-one years of age, or the day of her marriage; "but if she should die without legal heirs, or before she reaches twenty-one years, her share of my

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estate shall be given by my executor to my mother, brothers and sisters, or their representatives, share and share alike."

Held, that the term "legal heirs" was used in its limited sense of "child or children," and upon the death of the legatee, an infant and unmarried, after the death of the testator's mother, brothers and sisters, the children of the latter are entitled to the estate to the exclusion of the legatee's brother and sister of the half-blood.

From the Jay Circuit Court.

J. M. Haynes, for appellants.

J. W. Headington, J. J. M. LaFollette and *J. F. LaFollette*, for appellees.

COFFEY, J.—Charles Sumption died testate in the year 1865, leaving a widow, Martha Sumption, and one child, Mary Alfaretta Sumption. By his will he bequeathed all his property to his widow, Martha, except fifteen hundred dollars, which he bequeathed to his said daughter in the following terms:

"I give and bequeath to my daughter, Mary Alfaretta, the sum of fifteen hundred dollars of my personal estate, to be, by my executor hereinafter named, put at interest, the principal of which to be paid to her when she shall arrive at the age of twenty-one years, or the day of her marriage, shall it please Almighty God to spare her to see either; but if she should die without legal heirs, or before she reaches twenty-one years, her share of my estate shall be given by my said executor to my mother, brothers and sisters, or their representatives, share and share alike."

The widow, Martha, subsequently married Isaac Underwood, by whom she had two children, viz., Charles E. Underwood and Josephine Underwood, and then departed this life before the death of the said Mary Alfaretta Sumption.

Mary Alfaretta Sumption departed this life before she arrived at the age of twenty-one years, unmarried and without issue. Isaac Underwood took letters of administration on her estate, and filed his final settlement with the Jay Circuit

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Court, reporting for distribution the sum of one thousand and eighty-six dollars and ninety-three cents.

The appellees, who are the nephews and nieces of the said Charles Sumption, deceased, filed a petition in the Jay Circuit Court, praying that said money be distributed among them, to the exclusion of the said Charles E. and Josephine Underwood, as the representatives of the brothers and sisters of the said Charles Sumption, deceased, the mother and the brothers and sisters having departed this life before the death of the said Mary Alfaretta. The court, upon proof of the facts alleged in said petition, granted the prayer of the petitioners, and ordered said fund distributed among them, to the exclusion of Charles E. and Josephine Underwood.

Charles E. Underwood and Josephine Underwood appeal to this court, by their guardian, and urge that the order of the court below in excluding them in the distribution of said money was erroneous.

The question involved in the case depends upon the construction of the will of Charles Sumption. It is contended by the appellants that in the bequest to Mary Alfaretta Sumption, the term "without legal heirs," is used in its ordinary legal acceptation, while it is contended by the appellees that the term was used to signify "child or issue."

The primary object in construing wills is to ascertain the intention of the testator. In doing this the words used in the will are to be given their ordinary legal meaning, unless it is clearly made to appear by the context that they were used in a different sense.

The term "legal heirs" will be construed to mean "child or children," when it clearly appears from the will that the testator used it in that sense. *Jones v. Miller*, 13 Ind. 337; *Rusing v. Rusing*, 25 Ind. 63; *Rapp v. Matthias*, 35 Ind. 332; *Brown v. Harmon*, 73 Ind. 412; *Ridgeway v. Lanphear*, 99 Ind. 251; *Millett v. Ford*, 109 Ind. 159.

In the case of *Jones v. Miller*, *supra*, the bequest was: "To Samuel Stephen, my son, with the following exceptions, viz.:

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I give to Paulina Miller and Alexander Miller, the heirs of Nancy Miller, my daughter, one dollar each. * * * I further direct that if the aforesaid Samuel Stephen, my son, should decease without a lawful heir or heirs, that all that part of my estate, both real and personal, set off for the said Samuel Stephen, shall be divided in equal shares between the aforesaid Paulina Miller and Alexander Miller."

It was held that the term "*lawful heirs*" was used in its limited sense of child or heirs of the body of Samuel Stephens.

The language used in the will now under consideration is not essentially different from the language of the will above set out. In construing this will we must not lose sight of the fact that Mary Alfaretta could not die "*without lawful heirs*" so long as the appellees in this case were living, if we use the term "*lawful heirs*" in its ordinary legal sense.

To hold that the term "*legal heirs*" was used by the testator in this will in its ordinary legal sense, would be to hold that Charles Sumption was directing a division of his estate among parties who had departed this life before the death of his daughter, Alfaretta, for there could be no failure of legal heirs in that sense as long as the nephews and nieces lived.

We think that the term "*legal heirs*" in the will of Charles Sumption was used in its limited sense of "*child or children.*"

Having reached that conclusion, we do not think the circuit court erred in distributing the money in the hands of the administrator among the appellees to the exclusion of the appellants.

Judgment affirmed.

Filed Feb. 13, 1889.

117	312
142	496
117	312
162	532

No. 13,393.

HARSHMAN v. MITCHELL.

REAL ESTATE.—Contract to Convey.—Specific Performance.—Demand.—Where one who has contracted to convey real estate repudiates the contract, or denies the right of the other to receive a deed, a demand for a conveyance is not necessary before a suit to enforce specific performance.

SAME.—Defendant not Required to Make Demand.—A party who is brought into court as a defendant and challenged to litigate matters in controversy, is not required to make a demand which might be necessary if he were the moving party.

SAME.—Tenant in Common.—Right to Specific Performance by Co-Tenant.—One tenant in common, who has become the owner by assignment of a title bond executed by himself and his co-tenant, may, upon performing the conditions of the bond, enforce specific performance of the contract to convey against his co-tenant.

From the Clinton Circuit Court.

J. N. Sims, for appellant.

J. V. Kent and *J. W. Merritt*, for appellee.

MITCHELL, J.—Harshman commenced an action for partition, alleging that he and the defendant Mitchell were the owners as tenants in common of certain real estate in Clinton county.

The defendant answered by a general denial, and also set up by way of cross-complaint, that, prior to the 12th day of December, 1872, the plaintiff and cross-complainant were the owners as tenants in common of the real estate described in plaintiff's complaint, and that on the above mentioned date they sold and conveyed the same, by title bond, to Bazzle Bailey for the nominal consideration of three thousand dollars, which, according to a stipulation written in the bond, was to be paid by procuring certain notes, executed by the plaintiff Harshman, and for the payment of which he alone was liable, amounting to about forty-one hundred dollars, to be surrendered up and cancelled, whereupon the obligors in

Harshman v. Mitchell.

the bond bound themselves upon reasonable request to execute to the obligee, Bailey, his heirs or assigns, a good and sufficient warranty deed in fee simple for the land in controversy.

It was alleged that the title bond had been duly assigned for a valuable consideration by Bailey to the cross-complainant, and that he had fully performed the condition of the bond by procuring the notes therein mentioned, and by causing them to be cancelled and duly surrendered up to the plaintiff, Harshman. He prayed as relief that the plaintiff be decreed to specifically perform the obligation imposed upon him by the bond, and that he be required to convey his apparent undivided interest in the real estate to the cross-complainant.

Bailey also became a party, and by appropriate pleadings sought to have the assignment of the title bond to Mitchell set aside. The facts as specially found by the court are not materially variant from those set forth in the cross-complaint, as above summarized, and upon the facts so found the court stated conclusions of law and rendered judgment according to the prayer of the cross-complainant.

It is contended on the appellant's behalf that the judgment must be reversed, because it was not alleged in the cross-complaint nor found by the court that a demand had been made for a deed before filing the cross-complaint.

Ordinarily a demand for a conveyance is necessary before a suit can be maintained to enforce specific performance of a contract to convey real estate, but the purpose of a demand is to give the party bound to convey the opportunity of making a deed without being subjected to the costs and inconvenience of a suit. If, therefore, it appears that the party thus bound has repudiated the contract, or denies the right of the other to receive a deed, a demand is unnecessary. *Burns v. Fox*, 113 Ind. 205; *Cutsinger v. Ballard*, 115 Ind. 93.

Besides, a party who is brought into court by his adversary and challenged to litigate matters in controversy, is under no obligation to make a demand which might be neces-

Harshman v. Mitchell.

sary under other circumstances, if he were the moving party. *Stix v. Sadler*, 109 Ind. 254.

It is contended next that the bond relied on is the joint obligation of Harshman and Mitchell, and that the assignment to the latter by Bailey united the right of action and the liability on the bond in one and the same person, and that hence the cross-complainant had no right to enforce specific performance against the appellant.

This view is not maintainable. Although both joined in the bond to Bailey, the obligation to convey the land, upon the performance of the contract on his part, was several. Notwithstanding Harshman and Mitchell were tenants in common, neither could have conveyed for the other. The rule that the release of one joint obligor discharges the other has no application to a case like the present. The assignment of the bond to the cross-complainant discharged his separate obligation to convey his undivided interest in the land, and when he performed the condition, and caused the appellant's notes to be cancelled and surrendered up to him, there remained no obstacle in the way of the specific enforcement of the several obligation of the appellant to convey his individual interest in the land to the assignee of the bond.

The judgment is affirmed, with costs.

Filed Feb. 13, 1889.

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No. 13,594.

WILSON v. BUELL.

SPECIAL FINDING.—*Part of Record.*—A special finding made by the court upon the request of the parties becomes a part of the record, without more.

FORMER ADJUDICATION.—*Conclusiveness of.*—An adjudication in a prior action is conclusive not only as to what was actually decided therein, but also as to every other matter which the parties might have litigated in the case.

SAME.—*Contract.*—*Merger.*—The judgment in an action upon a contract merges the contract as a cause of action for all existing breaches, and another action therefor can not be maintained.

SAME.—*Parties.*—To make a judgment effective as a bar to a subsequent action, it is not necessary that the parties to both actions shall be identical. It is sufficient if the parties to the pending action were before the court in the prior action and bound by the judgment therein rendered.

SAME.—*Joint and Several Liability of Defendants.*—A plaintiff, although his complaint counts upon a joint obligation, has the right to offer evidence to show a separate liability as to one of the defendants, and, this being so, the judgment rendered in the action will be a bar to a subsequent action against one counting upon his separate liability.

From the Shelby Circuit Court.

E. P. Ferris, W. W. Spencer and J. S. Ferris, for appellant.
T. B. Adams and L. T. Michener, for appellee.

BERKSHIRE, J.—This case was tried by the court, and at the request of both parties there was a special finding made. Counsel for the appellee contend that the special finding is not properly in the record, and is therefore, in effect, but a general finding.

Counsel's contention is not tenable. The record shows that, at the proper time, both plaintiff and defendant requested a special finding; this is all that the statute requires.

Upon the facts as found the court stated its conclusions of law in favor of the appellee.

117	315
117	354
121	488
121	568
117	315
137	172
117	315
140	212
117	315
145	133
146	291
117	315
161	121
117	315
167	432

Wilson v. Buell.

The appellant excepted to the conclusions of law, and judgment was rendered for the appellee.

The appellant appeals and assigns three errors, as follows:

1. The court erred in overruling the demurrer to the third paragraph of answer.
2. The court erred in overruling the demurrer to the fourth paragraph of answer.
3. The court erred in each of its conclusions of law upon the facts as found.

We are not called upon to consider the second alleged error, for the reason that the court found against the appellee upon the issue tendered by the fourth paragraph of answer.

The third paragraph of answer reads as follows: "And for further answer the defendant says, that heretofore, to wit, September 29th, 1884, in this court the said Greenville Wilson impleaded the defendant and Robert Wagner in an action for the same identical debts and causes of action as are set forth in the case at bar, the same identical debts and causes of action being pleaded in the complaint as were pleaded and charged in the complaint in the action first brought as aforesaid, and none other; that afterwards such proceedings were had in said cause that this defendant and said Wagner joined issue in said action with said plaintiff upon said complaint, and afterwards, to wit, ———, 1885, and before the commencement of this suit, upon the trial of the issues so joined in said cause, being the same matters as are here joined in the case at bar, it was adjudged by the court that the said plaintiff took nothing as against this defendant, and that this defendant recover of and from said plaintiff his costs and charges in said behalf laid out and expended; but that said plaintiff should have and recover of and from said Wagner the sum of \$——, and the costs of the action, which said judgments are in full force and unreversed. Wherefore he demands judgment."

We have been unable to discover any infirmity in this par-

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agraph of answer. It is in the form ordinarily used in pleading a former recovery.

Counsel for the appellant contend that the answer does not show with sufficient definiteness that the matters litigated in the former action were the same that are involved in this action; that it was not sufficient to allege that the contract counted upon in the former action was the same contract sued upon in the present action, but to make the answer good it was necessary that it contain an averment that the breaches complained of were the same.

We have carefully examined the authorities cited and do not think they support counsel's position.

The law is well settled in Indiana, by an unbroken line of cases from the organization of this court to the present, that an adjudication in a prior action is a determination not only as to what was actually decided therein, but also as to every other matter which the parties might have litigated in the case. *Fischli v. Fischli*, 1 Blackf. 360; *Vail v. Rinehart*, 105 Ind. 6; *Elwood v. Beymer*, 100 Ind. 504; *Richardson v. Jones*, 58 Ind. 240.

If at the time of the prior action the contract sued upon had been broken in other particulars than those alleged in the complaint, the judgment is none the less a bar as to them than it would have been if they had been included in the complaint. *Elwood v. Beymer*, *supra*.

The proceedings in the former action merged the contract and all rights of action, because of breaches thereof, into the judgment. Freeman Judg., sections 215, 216, 240; *Gould v. Hayden*, 63 Ind. 443; *Crosby v. Jeroloman*, 37 Ind. 264, see pp. 277-8; *City of North Vernon v. Voegler*, 103 Ind. 314; *Indiana, etc., R. W. Co. v. Koons*, 105 Ind. 507.

But if the position taken by counsel was a tenable one, the answer would be good. It alleges that the debts and causes of action sued upon are the same identical debts and causes of action that were litigated and determined in the former action, and this is equivalent to an allegation that the breaches

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of the contract complained of in the present action are the same as in the former action.

But it is contended that the parties to the two actions must be identical.

We are not of this opinion. If the position assumed is a correct one, the effect of a former recovery could be avoided in every case by the addition of a party not before the court in the first action, or by omitting one of the parties thereto. All that is required in relation to parties is, that the parties to the pending action were before the court in the prior action and bound by the judgment therein rendered. The law in this particular is so well settled as not to require a citation of authorities. See *Richardson v. Jones, supra*.

The complaint is in two paragraphs; the substance of the first is, that, on December 12th, 1879, the plaintiff delivered to the defendant two checks on the First National Bank of New York, amounting to \$1,050, with the request that the defendant take the same to one of the banks in Shelbyville and procure the money thereon for the plaintiff; that the defendant did, on said day, procure thereon the sum of \$1,049 in cash for the plaintiff; and that, on the 1st day of January, 1880, the plaintiff requested payment of the defendant, which was refused, and that he converted the money to his own use, and that said sum is due and wholly unpaid.

The second paragraph charges that, on the 12th day of December, 1879, the defendant obtained for the plaintiff \$1,049, and on the 1st day of January, 1880, the plaintiff requested payment, which was refused by the defendant.

The complaint in the former action, as set out in the special finding of the court, was entitled, *Greenville Wilson v. Israel Buell and Robert Wagner*, and was in three paragraphs, but one of which we need consider.

This paragraph, in substance, was, that the defendants were indebted to the plaintiff in the sum of \$1,500 for money had and received of the plaintiff on the 12th day of December,

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1879, and that the same was due and wholly unpaid, though payment had often been requested.

The special finding of the court shows that the defendants filed several paragraphs of answer, one of which was the general denial; that the cause was put at issue by the filing of a reply, and afterwards submitted to a jury, who returned a verdict in favor of the plaintiff and against the defendant Wagner for the sum of \$260, and a verdict against the plaintiff and for the defendant Buell.

It further appears in the special finding that the evidence given in this case was the same as that given in the former case, and that the facts which were submitted to the jury were the same.

If the matters in issue in this suit might have been litigated and determined in the former action, then unquestionably the court was right in its conclusions of law.

The first paragraph of the complaint in the first action was a common count for money had and received. Any evidence tending to prove that the appellee had received money on the appellant's account, which he was under legal obligation to repay, was admissible in support of the complaint.

We think there can be no question but that evidence which tended to prove that on the 12th day of December, 1879, the appellant delivered to the appellee two checks on the First National Bank of New York, amounting to \$1,050, with the request that the appellee take them to one of the banks in Shelbyville and procure the money on them for the appellant, and that the appellee on the same day realized \$1,049 from the checks, and that upon demand he refused to account to the appellant for the money, would have been very pertinent to support a common count for money had and received.

But it is contended that the complaint in the former action counted on a joint obligation against the appellee and Wagner, while the present action is on the separate obligation of the appellee.

In *Carmien v. Whitaker*, 36 Ind. 509, the action was

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brought before a justice of the peace. The cause of action was as follows: "Andrew Whitaker and George H. Cox, to Curtis C. Carmien, Dr., to 160½ bushels of potatoes, at \$1.05 per bushel—\$168.52. June 1st, 1868."

There was a trial before the justice, and a judgment against both of the defendants. Whitaker alone appealed to the circuit court.

The circuit court refused to hear evidence tending to prove the separate and sole liability of Whitaker, the competency of which was the only question presented to this court. This was held to be error, and the judgment reversed. We quote from the opinion: "We hold that the plaintiff was warranted in introducing evidence to show the joint liability of Whitaker and Cox, or the separate liability of Whitaker. The sections of the code above referred to authorized the court to render judgment for or against one or more plaintiffs or defendants, but this can not be done unless evidence can be introduced to show who is or is not liable to a judgment, or to recover in the action."

In *Terwilliger v. Murphy*, 104 Ind. 32, the appellee sued the appellant and two others before a justice to recover the value of a quantity of drain tile alleged to have been sold to them; the result of the trial was a separate judgment against Frank Terwilliger, the appellant, for \$88.56; he appealed to the circuit court, and a judgment was there rendered against him for \$88.45, and he then appealed to this court. The only question presented to this court was as to the sufficiency of the evidence to support the finding. The point made was, that in a joint action against three persons it was error to admit evidence tending to show a separate liability as to one. The ruling was approved, and the judgment of the court below affirmed.

Murray v. Ebright, 50 Ind. 362, was an action to recover the value of a horse alleged to have been sold by the appellant to the appellee and one Sohn. In that case this court says: "Where several persons are sued upon what is alleged

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to be the joint contract of all, yet if, in proof, it turns out to be the contract of one or more of them, but not all, the plaintiff is entitled to judgment against the one or more whose contract it turns out to be, the same as if the one or more only had been sued."

In *Hubbell v. Woolf*, 15 Ind. 204, it is held, that in actions upon contract under our code, whether joint or several, or joint only, the plaintiff may recover against those of the defendants as to whom a good cause of action is made out, though he fail as to the others. See *Fitzgerald v. Genter*, 26 Ind. 238.

Richardson v. Jones, *supra*, is very much like the case at bar. Richardson sued Jones to recover an amount he claimed to be due him for legal services rendered. Jones answered that Richardson had brought an action against one Powell and himself in the Bartholomew Circuit Court, and sought a recovery for the same legal services, and that such proceedings were had that the defendants obtained judgment against the plaintiff for costs. To this paragraph of answer the plaintiff demurred, and his demurrer was overruled. The cause was tried and a judgment rendered for the defendant, and the plaintiff appealed. The question presented to this court was, whether the answer to which the court below overruled the demurrer was a good answer. The action of the court below was approved and the judgment affirmed.

We quote from the opinion given in the case:

"It can not be questioned, it seems to us, that, under the provisions of our practice act, the matters in issue between the appellant and appellee in this suit might have been litigated by and between them, in the appellant's action against the appellee and said Powell. Nor can it be doubted, we think, that, if, in said former action, the appellant had shown, by sufficient evidence, that the appellee alone was indebted to him on the account in suit, the appellant would have been

Tate et al. v. Foshee et al

clearly entitled, under our code of practice, to a judgment against the appellee, as if he only had been sued."

The causes of action in the former and present actions being substantially the same, the judgment in the former case for the appellee is a perfect bar to the present action.

The judgment is affirmed, with costs.

Filed Feb. 13, 1889.

No. 13,618.

TATE ET AL. v. FOSHEE ET AL.

REAL ESTATE.—*Parol Contract of Exchange.—Performance.—Statute of Frauds.—Estoppel.*—Where parties enter into a parol agreement to exchange part of their respective lots for the purpose of rectifying and straightening the boundary lines, and the agreement is fully carried into effect and possession surrendered, the transfer is valid, and the parties are estopped from asserting title to the ground which they have respectively exchanged.

From the Posey Circuit Court.

W. P. Edson and F. P. Leonard, for appellants.

A. P. Hovey, G. V. Menzies and E. M. Spencer, for appellees.

ELLIOTT, C. J.—In 1872 William Foshee and Charles Leonard were the owners of lots in the city of Mount Vernon, and in that year they entered into an agreement to exchange part of their respective lots for the purpose of rectifying and straightening the boundary lines of their lots. During that year this agreement was carried into effect. A new dividing line was agreed upon, a division fence erected, and Foshee, in

117	322
167	170

Tate et al. v. Foshee et al.

pursuance of his agreement, graded and gravelled a street in front of Leonard's property. Foshee was placed in possession of the parcel of land now claimed by the appellants, and Leonard was put in possession of the parcel which it was agreed he should receive in exchange.

The law is decisively and plainly with the appellees. The agreement for the exchange, although in parol, is not within the statute of frauds, because it was not only partly performed, but was completely executed. Leonard acquired a complete and perfect title. There was, in effect, a valid parol partition, fully executed, and also an effectual establishment of a boundary line, so that the transfer was as effective as if it had been made by deed. *Bruce v. Osgood*, 113 Ind. 360; *Wright v. Jones*, 105 Ind. 17; *Hauk v. McComas*, 98 Ind. 460; *Gay v. Parpart*, 106 U. S. 679; *Kinsey v. Satterthwaite*, 88 Ind. 342; *Main v. Killinger*, 90 Ind. 165.

In addition, there is present the element of estoppel, which effectually precludes Leonard or his heirs from asserting title. *Pitcher v. Dove*, 99 Ind. 175.

The proper offer of proof was not made, and, therefore, no question is presented on the ruling denying the appellants the right to propound the interrogatory which they proposed to ask Mattie L. Tate.

Judgment affirmed.

Filed Feb. 14, 1889.

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117	324
124	437
117	324
120	330

117	324
120	247

117	324
137	210

117	324
142	635
143	336
143	423

117	324
144	695
147	331

117	324
149	72
152	42

No. 13,584.

THE CITY OF PLYMOUTH v. MILNER.

APPEAL.—Amount Involved.—The statute limiting appeals to the Supreme Court to cases involving fifty dollars and more, does not apply to actions commenced in the circuit court, but only to actions originating before a justice of the peace or mayor of a city.

PLEADING.—Demurrer.—A demurrer addressed to an entire pleading containing one good paragraph should be overruled.

TRIAL.—Failure of Plaintiff's Testimony to Support Complaint.—Dismissal of Action.—Instructing Jury to Return Verdict.—A cause should not be dismissed on motion of the defendant because the plaintiff's testimony does not sustain the complaint; but, after the close of the evidence, the defendant may, if it is not sufficient, ask that the jury be instructed to return a verdict in his favor.

MUNICIPAL CORPORATION.—Negligence.—Sidewalk.—Visible Defect.—Contributory Negligence.—A city is not liable to one who sustains an injury by reason of a defective sidewalk, if the latter could have avoided the injury by looking, and shows no excuse for failing to look.

From the Marshall Circuit Court.

A. C. Capron, for appellant.

V. P. Kirk, for appellee.

COFFEY, J.—This was a suit to recover damages on account of an injury sustained by the appellee, occasioned by the alleged defective and dangerous condition of the streets in the city of Plymouth. The complaint is in three paragraphs, differing in no material respect except in the description of the condition of said streets.

A demurrer was filed to the complaint by the appellant, which was overruled, and an exception taken.

Issues were formed and a trial had by jury, which resulted in a verdict and judgment for the appellee for the sum of twenty-five dollars.

The appellee has filed a written motion in this court to dismiss the appeal, because the amount involved, exclusive of

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interest and costs, does not exceed fifty dollars. The statute limiting appeals to cases involving fifty dollars and upwards does not apply to cases commenced in the circuit court. It applies to cases originating before a justice of the peace or the mayor of a city only; and as this case was commenced in the circuit court the motion must be overruled.

The errors assigned in this court are:

1st. That the court erred in overruling the demurrer to the complaint.

2d. That the court erred in overruling the motion of appellant to dismiss the action; and,

3d. That the court erred in overruling the motion for a new trial.

The demurrer to the complaint is joint, and is directed to the complaint as a whole.

While the first paragraph is, perhaps, defective in not alleging that the injury occurred without the fault or negligence of the appellee, the second and third, we think, state a good cause of action, and the court did not, therefore, err in overruling the demurrer. Where a demurrer is addressed to an entire pleading containing one good paragraph, it should be overruled. *Stanford v. Davis*, 54 Ind. 45; *Washington Tp. v. Bonney*, 45 Ind. 77; *Jewett v. Honey Creek Draining Co.*, 39 Ind. 245; *Jeffersonville, etc., R. R. Co. v. Cox*, 37 Ind. 325.

It appears by the record that, after the appellee had testified in the cause, the jury was excluded from the court-room, at the request of the appellant, and it then, by counsel, moved the court to dismiss the action, upon the ground that her testimony did not sustain the complaint. This motion was overruled and excepted to. In this the court did not err. After the close of the testimony in the cause, if the appellant was of the opinion that it was not sufficient to sustain a verdict for the appellee, it should have asked the court to instruct the jury to return a verdict in its favor.

The facts in this case, as they appear by the evidence in

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the record, are, that Plum street, in the city of Plymouth, runs north and south. Jefferson street runs east and west, crossing Plum street near the Vandalia Railroad. At the time the injury complained of was incurred by the appellee, workmen were engaged in grading and gravelling both these streets, and they were in an unfinished condition. A few weeks before the injury, one Thompson caused a sidewalk to be constructed on the north side of Jefferson street, terminating on Plum street. At the point where said sidewalk terminated on Plum street it was nine inches high. From that point there was no street crossing as yet constructed, but the sidewalk was left the proper height to join onto one when the city should finish grading Plum street. There were three lights in the neighborhood of the sidewalk—one not more than one hundred feet from the west end of the same. They were all burning at the time the injury occurred, and there was nothing to prevent the appellee from seeing that the sidewalk terminated at Plum street, and that there was no street crossing at that point. Without looking, the appellee walked off the west end of said sidewalk, and either sprained or dislocated her ankle.

It is not necessary to decide whether, under the circumstances, the city of Plymouth was guilty of negligence in permitting the sidewalk to remain in the condition it was, during the process of grading Plum street, as it is settled beyond dispute, in this State, that where one party sues another to recover on account of an injury occasioned by the negligence of the latter, the former must allege and prove that his negligence did not contribute to the injury.

A person is bound to exercise the faculties with which he is endowed by nature, and if he fails to look, without excuse, when by so doing an injury could be avoided, if he is injured he can not recover in a suit for such injury.

This rule is so well settled in this State that it is unnecessary to cite authorities to prove it.

The appellee knew that there was no crossing at Plum

Sullivan v. Jones.

street, and all that was necessary to avoid the injury of which she complains was to look. This she admits she was not doing when the injury occurred.

In our opinion the verdict of the jury was not sustained by the evidence, and the court erred in refusing to grant a new trial.

The judgment of the court below is reversed, at the costs of the appellee, with instructions to grant a new trial, and for further proceedings not inconsistent with this opinion.

Filed Feb. 14, 1889.

No. 14,430.

SULLIVAN v. JONES.

ASSAULT AND BATTERY.—*Complaint for Damages.*—*Venue.*—A complaint for damages for assault and battery need not state the county in which the assault was committed.

From the Johnson Circuit Court.

H. N. Spaan, T. W. Woollen and D. D. Banta, for appellant.
T. Hanna, G. M. Overstreet and A. B. Hunter, for appellee.

OLDS, J.—This is an action for damages for assault and battery. The only error assigned is, that neither paragraph of the complaint states facts sufficient to constitute a cause of action.

The complaint is in two paragraphs, and, omitting the caption, the first paragraph is as follows:

“William C. Jones complains of John E. Sullivan, Thomas O’Neal, John Ferriter and Jerry Sullivan, and says that the defendants, on the 27th day of August, 1886, in a rude, in-

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solent and angry manner, unlawfully touched, struck, beat and wounded the plaintiff to his damage one thousand dollars. Wherefore said plaintiff demands judgment in the sum of one thousand dollars."

The second paragraph contains the same material allegations of fact.

The only objection urged to either paragraph of complaint is, that they do not state the venue, and no authorities are cited in support of this position of counsel.

It is not necessary that they should do so. It is sufficient to allege the facts constituting the cause of action, and it is not necessary to state the county in which the unlawful acts were committed. *Morris v. Casel*, 90 Ind. 143; 2 Chitty Plead., 612; 3 Works Pr., pp. 28-29; *Benson v. Bacon*, 99 Ind. 156.

There is no error in the record.

Judgment affirmed, with costs, and five per cent. damages.
Filed Feb. 14, 1889.

No. 13,608.

WINSTANDLEY v. CRIM, AUDITOR.

SCHOOL FUND MORTGAGE.—*Sale.—Injunction.—Secret Vendor's Lien.—Negligence of Auditor.*—A complaint to enjoin a sale of land by a county auditor to satisfy a school fund mortgage, which shows that the plaintiff, after the mortgage was executed, purchased the land under the foreclosure of a secret vendor's lien antedating the mortgage, and alleges that the plaintiff, at the time the mortgage was executed, held a judgment against the mortgagor, but makes no claim of title under that judgment, and alleges further that the auditor in taking the mortgage failed to require an oath of the mortgagor, and a certificate of the clerk

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and recorder, that the land was unincumbered, and also failed to have the property appraised, as provided by law, is not sufficient to entitle the plaintiff to an injunction or to avoid the mortgage. For the complaint in full, see opinion.

From the Lawrence Circuit Court.

M. F. Dunn and *G. G. Dunn*, for appellant.

W. H. Martin, for appellee.

BERKSHIRE, J.—This is an action to obtain a perpetual injunction.

The court below sustained a demurrer to the complaint; the appellant refused to amend, and judgment was rendered against him for want of a good complaint.

The only error assigned is the sustaining of the demurrer to the complaint.

There are two exhibits, marked A and B, filed with the complaint, but as they are not the foundation of the action they are wholly immaterial and will not receive further attention.

The character of the averments in the complaint is such that we can not do better than to copy the complaint. Omitting the title, it reads: "The plaintiff herein, William C. Winstandley, complains of Isaac H. Crim, auditor of Lawrence county, and says that heretofore, to wit, on June 11th, in the year 1885, he, plaintiff, became the purchaser at sheriff's sale of the following described lands, situate in Lawrence county, Indiana, to wit: The northeast quarter of the southeast quarter of section seven (7), town. four (4) north, of range one (1) west, containing forty (40) acres; that the sheriff of Lawrence county thereupon issued to him a certificate of purchase therefor, which said certificate he, plaintiff, held until the same was merged in the deed hereinafter mentioned; that said lands were sold upon a decree foreclosing a vendor's lien thereon in favor of this plaintiff, in a suit heretofore tried in the Lawrence Circuit Court, wherein this plaintiff was plaintiff, and Milton N. Moore, Austin Bass

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and Wesley Rout were defendants, wherein it was expressly directed and decreed that the rights of this plaintiff were prior and paramount to the rights of said Moore, Bass and Rout; and it was also expressly found and decreed that as to the sum of two hundred dollars, with interest thereon accrued from May 24th, 1887, said sum and interest, represented by a note signed by Austin Bass and payable to Wesley Rout, of said date, was due this plaintiff, and, being for purchase-money of the lands hereinbefore described, was a vendor's lien upon said lands and a first and paramount lien to all others; and plaintiff says that said note at said date and long prior thereto, and prior to the execution of the mortgage hereinafter mentioned and herein complained of, was a first lien upon the lands herein and in said mortgage described; and plaintiff says that, subsequently, said sum of money remaining due and unpaid, he caused an order of sale to be issued upon said decree, and your petitioner says that the defendant Isaac Crim, auditor of Lawrence county, acting in his official capacity, has caused the said lands to be advertised for sale, Monday, March 22d, 1886, to satisfy a pretended mortgage to the common school fund, and will, unless restrained and enjoined from so doing, sell the same.

"Your petitioner files herewith a printed copy of the notice of the said auditor, marks the same exhibit A, and makes the same a part hereof. And he says that said auditor is pretending that his said mortgage is a first lien on said lands, and unless restrained from so selling the same, will proceed, to his irreparable injury and detriment. And plaintiff says that he, under said order of sale and decree aforesaid, now holds a deed for said lands from the sheriff of Lawrence county, Indiana, which has been duly recorded, and that the plaintiff is now in possession of said lands under said deed. Plaintiff says defendant ought to be restrained and enjoined from proceeding further in said matter, for the reason that neither said defendant nor the common school fund in said county and State has any interest in said lands; that the

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said pretended mortgage on which defendant is offering to sell said lands is void, and of no effect, in this, to wit, that the said mortgage was taken by said auditor after he had been put upon his inquiry of the insolvency of the said Austin and Lucy Bass, mortgagors, and the existence of this plaintiff's claim; that, at the time of the execution of said mortgage, said Bass and Bass were wholly insolvent, and as said auditor had good reason to know; that said mortgage is wholly void, for the reason that, at the time the same was executed, there was a judgment in the Lawrence Circuit Court in favor of this plaintiff, which was a lien upon the same to the amount of more than the value of said land, which judgment at said date was in full force, due and unpaid, and unappealed from, as then shown by the records of said Lawrence Circuit Court, and was prior to all rights and equities of said Austin Bass in and to said land, and that when said Bass purchased said land by him so mortgaged to the school fund, he took the same with full knowledge of, and subject to, said lien; and void for the further reason that no certificate of the clerk and recorder was ever filed by the applicant with said auditor prior to the execution of the said mortgage, and for the further reason that a period of more than two years has elapsed without said land having been offered for sale, and without the interest having been paid, and for the further reason that said mortgage was executed without the said Austin Bass having ever taken an oath as required by law, and without taking any oath, that said property in said mortgage described was without encumbrance, and for the further reason that said property was never appraised by three freeholders residing in the neighborhood of said lands, as required by law, and for the further reason that at the time of the execution of said school fund mortgage, June 27th, 1878, said lands were encumbered by the lien of the judgment in the Lawrence Circuit Court for more than their full value, in favor of this plaintiff as assignee of Davis Harrison, and, also, by the note of Austin Bass to Wesley Rout, which was

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subsequently declared a vendor's lien, and which was then a vendor's lien upon said lands; and plaintiff files a copy of said mortgage herewith, and makes the same a part hereof, and marks it exhibit B. Wherefore the plaintiff asks that the said mortgage of said school fund be declared void, and set aside as against the plaintiff, and that the lien of the plaintiff be declared a prior lien, and that the said Crim be perpetually enjoined of any interference with the same, or selling the same, and that he, Crim, auditor, be temporarily enjoined until the matter can be heard and determined."

After setting out the complaint, our opinion is brief. All the facts that are averred in the complaint may be true, as admitted by the demurrer, and yet the State of Indiana be a purchaser for value without notice.

The complaint avers that the appellant, when the mortgage was executed, held a judgment, that was a lien upon the mortgaged lands, greater than the value of the lands. But the appellant makes no claim of title under this judgment.

The complaint alleges a neglect of duty on the part of the auditor when he made the loan and accepted the mortgage, but we can not imagine why the appellant should complain of that. If the county auditor was guilty of the negligence alleged against him, it may be that the State of Indiana will have cause for complaint should loss to the school fund follow as the result, but we can imagine no reason why the school fund should be prejudiced and the appellant correspondingly benefited because of such negligence.

It is argued that if the auditor had required of the mortgagors a proper affidavit at the time he made the loan, the existence of the appellant's vendor's lien would have been made known. It might have been or it might not; what the result would have been is past finding out. But one thing is certain, the trust fund can not be prejudiced because of the negligence of the auditor in the particulars alleged.

The law requires the affidavit as a safeguard to the trust fund, not to the citizen.

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The appellant, when he elected to rely on his secret lien, assumed the risk of losing his security in case an innocent purchaser, for value and without notice, should appear.

If the appellant had taken a mortgage to secure the obligation which he held, and had had it duly recorded, his rights would have been fully protected, and the rights of no one else jeopardized in a controversy over the question of notice.

The judgment is affirmed, with costs.

Filed Feb. 14, 1889.

No. 13,524.

STEELE ET AL. v. HANNA ET AL.

DRAINAGE.—Mistake in Description.—Correction while Proceedings are in Fieri.

—Where, in drainage proceedings, a clerical mistake occurs in the report of the commissioners in the description of lands affected, which is carried into subsequent interlocutory entries, such mistake may, at any time before the work is completed and the final report of the commissioner in charge is approved, be corrected by the court on petition or motion of the parties, or on its own motion.

From the Hancock Circuit Court.

W. R. Hough, E. Marsh and W. W. Cook, for appellants.

W. H. Martin, for appellees.

MITCHELL, J.—It appears from the petition upon which the present proceeding is based, that a certain drain or ditch had been duly located and established under the drainage act of 1881, as amended by the acts of 1883 and 1885, by the order and judgment of the Hancock Circuit Court, and that in the

117	333
124	470
126	510
117	333
137	225
117	333
154	106

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course of the proceeding, viz., in the report of the commissioners of drainage, a mistake in the description of a certain quarter section corner had occurred by inadvertently writing the word "south" where the word "north" should have been, and was intended to be, written. This mistake was carried through all the subsequent proceedings wherever the description of the proposed drain was written. After the adjournment of the court for the term at which the drain was established, and when the commissioner to whom the matter was referred was about to proceed with the construction of the work, the mistake was discovered. In all other respects the proceedings for the location of the ditch conformed to the requirements of the statute.

This proceeding was instituted by two of the parties interested in the construction of the ditch, who set up the facts in detail in a verified petition, and moved the court to cause the mistake in the description in the report of the drainage commissioners, and in the subsequent proceedings, to be corrected in the respects mentioned, so that the description on the record might correspond with the location of the drain as actually made. All the parties interested were duly summoned into court.

Upon due consideration of the petition and the proofs made, the corrections were ordered as prayed.

It is now contended that the court had no power to order the description to be corrected upon the facts stated in the petition or motion, and that even if the facts therein stated were sufficient, the correction could not be ordered upon a mere motion after the close of the term at which the order establishing the drain was made, but that a formal complaint, by persons denominated as plaintiffs, having a joint interest in the relief demanded, against others who were properly named as defendants, was necessary. We do not concur in this view. This is in no proper sense an independent action, such as can only be commenced by complaint, as ordinary civil causes are commenced, agreeably to the pro-

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visions of section 314, R. S. 1881, and other sections of the code of civil procedure.

Notwithstanding the order of the court confirming the report of the drainage commissioners, and establishing the ditch, and referring the matter to one of the commissioners, for the construction of the work, the proceeding remained *in fieri*, and will so continue, until the work is completed and a final report made to, and approved by, the court.

The orders above mentioned were of an interlocutory character. An order or judgment is interlocutory in a sense, even though it settles the rights of the parties as then presented to the court, whenever something further remains to be done, as where there is an accounting to be had, a question of damages to be ascertained, or a reference required in order to carry into effect the judgment or decree already given. *Cambridge Valley Nat'l Bank v. Lynch*, 76 N. Y. 514.

The commissioner having charge of the work is, by the express terms of the statute, under the direction and control of the court until the work is finally completed and a final report of the receipts and expenditures made. Section 4279, R. S. 1881; Acts 1885, pp. 139, 140.

By the provisions of section 8 of the act of 1885, the court is authorized to release any person or modify his assessment without affecting the rights or liability of any other person, and also upon supplemental petition to bring in other persons than those whose lands are mentioned in the original petition.

These provisions are persuasive of the fact that the proceedings, like those in cases of the administration of decedents' estates, and receiverships and the like, remain under the control of the court until the work is finally completed, and the final report of the commissioner approved. This being the status of the case, it is brought fairly within the principles which ruled *Ryon v. Thomas*, 104 Ind. 59.

It is an inherent power of a court, while a proceeding remains under its control, to cause its record, or to cause or

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permit any process, return or report, to be amended or modified, so as to conform to what was actually done, as the justice of the case may require. This may be done summarily, either upon proceedings instituted for that purpose by a party interested, or by the court upon its own motion. In such cases formal issues and pleadings are not contemplated, nor does the alleged insufficiency of the petition or motion ordinarily present any question for consideration. *Runnels v. Kaylor*, 95 Ind. 503.

It was, therefore, entirely within the province of the court, when the fact was brought to its attention, whether by motion, petition, or in any other way, that a mistake in the description had occurred, to make inquiry and examination concerning the matter, and if a mere clerical mistake was in fact made, to cause it to be corrected.

It would be intolerable and a reproach upon the administration of the law, if an expensive proceeding, still in progress and under the control of the court, could be wholly frustrated by a mere slip of the pen, such as occurred in the present case.

It is within the province of a court to correct the verdict of a jury where it is apparent from data properly in the record that there was an error in computation, or an omission or mistake. *Dawson v. Shirk*, 102 Ind. 184, and cases cited. In like manner an officer may be permitted or required to correct a return in order to make it conform to the facts in the case.

So the commissioners of drainage having inadvertently written the word "south," when they intended to write "north," and having, in fact, actually surveyed and located the ditch on a particular line corresponding with that indicated in the petition, it would defeat the ends of justice to hold that this could not now be corrected.

We are not required to enter upon the consideration of the general power of courts to correct their records or process, or other papers pertaining to proceedings in court, after the ex-

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piration of the term, when the matter is no longer *in fieri* and under the control of the court. The present is not such a proceeding.

The court committed no error.

The judgment is affirmed, with costs.

Filed Feb. 14, 1889.

117	337
117	599
117	600
117	337
131	527

No. 13,983.

THE NEW ALBANY AND EASTERN RAILWAY COMPANY
v. DAY.

SUPREME COURT.—Practice.—Rulings of Trial Court.—Presumptions in Favor of.—All reasonable presumptions are indulged in favor of the regularity of the proceedings of the trial court.

SAME.—Questions Must be Properly Presented to Trial Court.—Questions not properly presented to the trial court will not be considered on appeal.

From the Floyd Circuit Court.

A. Dowling, for appellant.

C. L. Jewett, H. E. Jewett and *E. G. Henry*, for appellee.

ELLIOTT, C. J.—The appellant filed an instrument of appropriation and secured a condemnation of land owned by the appellee.

The record does not show when the appellee's exceptions were filed, but it does show that exceptions were filed, and that the issue joined between the parties was tried and determined by the court. No objection was made by the appellant in the court below to the form of the exceptions, nor to the time within which they were filed.

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The motion for a new trial assigns causes questioning the amount of the damages assessed, and also the sufficiency of the evidence, but it does not bring before the court for review any question as to the time of filing the exceptions.

Two elementary rules of practice dispose of the point made by the appellant upon the exceptions: 1st. All reasonable presumptions are indulged in favor of the regularity of the proceedings of the trial court. 2d. Questions not properly presented to the trial court will not be considered on appeal.

The evidence supports the verdict.

The court did right in rendering judgment in favor of the appellee for the damages assessed in his favor. *Chicago, etc., R. W. Co. v. James*, 103 Ind. 386.

Judgment affirmed.

Filed Feb. 15, 1889.

No. 14,683.

THE STATE *v.* SEVIER.

CRIMINAL LAW.—*Exemption of Defendant from Costs.*—Under section 1833, R. S. 1881, the jury may be instructed that if they find the defendant guilty, they may, in their discretion, exempt him from all costs.

SAME.—*Intoxication in Public Place.*—*Unintentional Intoxication.*—Under section 2091, R. S. 1881, one who is found in any public place in a state of intoxication is guilty of a misdemeanor, without regard to whether the condition of intoxication be produced by appetite or mistake, or result from too closely following the prescription of a physician preparatory to having teeth extracted.

From the Sullivan Circuit Court.

L. T. Michener, Attorney General, *W. C. Hultz*, Prosecuting Attorney, and *O. B. Harris*, for the State.

The State v. Sevier.

W. C. Barrett, J. T. Hays, W. S. Maple and J. C. Chaney,
for appellee.

BERKSHIRE, J.—This was a prosecution originating before a justice of the peace. There was a conviction before the justice and an appeal taken to the circuit court, a trial had in that court and an acquittal.

The State appeals upon a question reserved as provided in the third clause of section 1882, R. S. 1881.

The appellee is charged in the affidavit with a violation of section 2091, R. S. 1881, which reads as follows:

“Whoever is found in any public place in a state of intoxication shall be fined any amount not exceeding five dollars.”

There are two errors assigned: 1. The court erred in giving to the jury instruction number four. 2. The court erred in giving to the jury instruction number five.

The fourth instruction is, in substance, that if the jury find the defendant guilty, they may, in their discretion, exempt him from all costs.

This instruction, we think, was proper and within section 1838, R. S. 1881.

Counsel for the State contend that this section ought to be construed with other sections of the statute, and, when so construed, that it does not authorize the court or jury trying the cause to excuse the defendant, when found guilty, from the payment of costs.

The whole section reads thus: “When the defendant is found guilty, the court shall render judgment accordingly; and the defendant shall be liable for all costs, unless the court or jury trying the cause expressly find otherwise.”

Unless the latter clause of the section authorizes the court or jury trying the cause to find the defendant guilty and relieve him from the payment of costs, then it is meaningless. The construction contended for, if adopted, would, in effect, repeal that much of the section.

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We will set out the fifth instruction :

“ If you find from the evidence that the defendant was advised by a reputable and practising physician to take intoxicating liquors as a means preparatory to having his teeth extracted, and, in pursuance of such advice and in good faith, he took stimulants according to the direction of his family physician, that he accordingly did have his teeth extracted, and the stimulants thus taken for that purpose caused him, in good faith, to become in a state of intoxication in a public place, such would not be a crime within the spirit or meaning of the law punishing public intoxication. Hence if you find from the evidence that at the time and place alleged, mentioned in the affidavit, the defendant was intoxicated, and you further find that it was produced in the manner above stated, you should find the defendant not guilty.”

This instruction was erroneous.

The offence does not consist in being found in a state of intoxication, but in being found in a public place in a state of intoxication. It is therefore wholly immaterial as to the circumstances which lead to the condition of intoxication ; it may be the result of appetite, or it may be the result of mistake, or it may come from following too closely the prescription of a physician. But be that as it may, so long as the person so intoxicated is not found in a public place there is no violation of the law.

Upon the other hand, if, while in a state of intoxication, a person is found voluntarily in a public place, the offence against the law is complete.

The purpose of the law is to protect the public from the annoyances and deleterious effects which may and do occur because of the presence of persons who are in an intoxicated condition.

The appeal is sustained, at the costs of the appellee.

Filed Feb. 15, 1889.

Low v. Freeman.

No. 13,553.

LOW v. FREEMAN.

EVIDENCE.—*Contradiction of Witness.—Promissory Note.—Consideration.—*

Payment.—Replevin.—In an action of replevin against the maker for the possession of a promissory note which the defendant claims to have been given for too large a sum, in settlement of an account which was erroneously computed, and that he has paid in full the amount actually due, he has the right, after the plaintiff has testified that he has all the time claimed the face of the note and interest, to have the latter answer as to whether or not he did not, at the time the note was delivered to the defendant, make a computation, which is exhibited and offered in evidence, showing a less amount due than that stated in the note.

INSTRUCTION TO JURY.—*Written Communication.—Answer to Interrogatories.*

—Where a jury, after retirement for deliberation, send a communication to the court that an interrogatory submitted to them embraces two questions, capable of being answered differently, and ask whether they are required to answer the whole interrogatory *yes* or *no*, the court may properly instruct them that they may answer part of the question *yes* and part *no*, if the evidence warrants it; but such instruction should be given by calling the jury into open court, and not by written communication sent to the jury-room.

From the Hancock Circuit Court.

J. A. New and *J. W. Jones*, for appellant.*J. H. Mellett*, *E. Marsh* and *W. W. Cook*, for appellee.

OLDS, J.—This is an action of replevin by appellee against appellant to recover the possession of a promissory note given by appellant to appellee for \$107.93, dated November 25th, 1885.

Appellant answered by general denial and an affirmative answer.

Trial by jury, verdict and judgment for appellee; motion for a new trial by appellant; motion overruled and exceptions.

Error assigned in overruling the motion for a new trial.

It was contended by the appellant that prior to the execu-

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tion of the note in question in this case there existed certain notes and accounts between appellant and the estate of Benjamin Freeman, for which appellee was acting as agent; that by agreement they were to select a disinterested person to make the calculations and adjust their differences; that they selected one Cooper, and he made the computations, making the amount due the estate from appellant \$107.93, and on that basis appellant gave the note in controversy, and by agreement appellant took the papers; that there was omitted from the computation which Cooper made, divers receipts and accounts held by appellant against the estate of said Benjamin Freeman, and it was agreed there was to be another computation, and appellant and appellee agreed that Ezra Eaton should make such computation, and to take into consideration all the notes, accounts and receipts not taken into account by Cooper, and that whatever amount appellant owed said estate should be left by appellant with Eaton for appellee; that Eaton made the computation, and there was due the estate from appellant only \$49; that appellant paid that amount, and notified the appellee, and thereupon received possession of the note in controversy.

In short, it was claimed by appellant that the only consideration for the note in controversy was the true amount he owed the estate of Benjamin Freeman, and that the amount was in fact only \$49, instead of the amount stated in the note, and that the amount of \$107.93 was stated in the note by reason of the erroneous computation made by Cooper in not taking into account all the credits due appellant; that appellant had in fact paid all that was due upon the note before it was surrendered to him; that, being paid, he was lawfully entitled to the possession of the note, and did not unlawfully detain the same at the time of the commencement of this suit.

These facts were stated in the affirmative paragraph of answer, and the defence might properly have been made under the answer in denial.

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The appellee was a witness in the case, and testified in his own behalf. He testified as to the note having been given to him by the appellant, and that afterwards the appellant came along by the residence of the appellee, and told appellee to go in and get the note and he would pay it; that appellee went into his house and got the note and computed the interest, and brought the note out where appellant was, and appellant asked to see the note, and he gave it to him. Appellant then asked the appellee what he claimed on the note, and he answered, the amount of the principal and interest. Appellant asked if he was sure he had made no mistake in his computation, and he answered he had not aimed to make any mistake; that nothing had been said about there being any mistake in the note.

The counsel for the appellant, in the course of the cross-examination, handed the witness, the appellee, a paper, showing a computation of amounts due on notes and accounts between appellant and the estate of Benjamin Freeman, showing the amount due the estate on November 25th, 1885, to be a balance of \$68.57, which appellant claimed was in the handwriting of the witness, and asked the witness the following question :

“ Well, was this calculation simply upon the note, or the accounts between Low and your father’s estate, for which the note was given? That is your handwriting, isn’t it?” showing the witness the statement and calculation. Objection was made and sustained, and the appellant excepted.

The counsel, proceeding, asked the witness :

“ I will ask you whether that is your handwriting, and whether that is the calculation you made in the house while Low was out in the buggy waiting for you to return with the note?” Which was objected to by appellee, and objection sustained, to which ruling of the court in sustaining the objection appellant at the time excepted.

The appellant offered the computation exhibited to the

witness in evidence, which was also objected to, and objection sustained and exceptions reserved by appellant.

There is manifest error in the rulings of the court in the exclusion of this evidence.

It was contended by appellant that there was no consideration for the note except \$49, and that that amount had been paid. And, on the other hand, the appellee claimed the full amount of the note, and had sworn that he claimed the full amount of the note and interest. The complaint alleges the value to be the full amount. Suppose the appellee had answered that the computation was upon the accounts existing between the appellant and the estate of the appellee's father; that the computation exhibited to him was in his handwriting; that he made it at the time he had testified he was in the house making a computation of the amount due on the note, and the exhibit had been admitted in evidence. It certainly would have tended to contradict his evidence that the whole amount of the note was due, and that he was in good faith claiming the whole amount of the note and interest. It would tend to show that the consideration for the note was the true amount due from the appellant to the estate of Benjamin Freeman, and that the amount was not more than \$68.57. It would tend to show that there was a mistake in the amount of the note, and that all he was claiming at that time was the \$68.57, else why was he making this computation? If the note expressed the true consideration, and there was due the amount stated in the note, and interest, why was he, when appellant called to pay it, computing the amount of the notes and accounts, and ascertaining the balance due on them to the estate?

It would certainly tend very strongly to prove the theory of the appellant that the consideration of the note was less than \$107.93.

If appellee, in good faith, was claiming and believing the correct amount was stated in the note, then there was no necessity of making the computation to ascertain the state of the

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account between appellant and the estate, but if appellant's theory is true, that Eaton was to make a calculation of these accounts and he was to leave with Eaton the amount found due, and that computation had been made and it was found there was only \$49 due, and appellant had paid it and notified appellee that he had paid it and called for the note, then it would be natural for appellee to make a computation at that time before surrendering the note.

Appellee, in answer to the question, may have denied the computation being in his handwriting, or that it had any relation to the note in question, or that it was made at the time appellant asked and received the note, but the appellant claimed that it was in his handwriting; that it was made at that time; that appellee was then admitting that all that was due on the note was the true amount due from appellant to the estate, and only claimed such amount to be \$68.57, and the only dispute at the time was whether it was \$68.57 or \$49, and he had the right, when appellee was on the witness stand, and having testified as he had, to have him speak upon the question and know whether he would admit or deny the facts as appellant claimed them to be.

There are some other errors assigned on the refusal of the court to admit testimony, but they are all of the same general character as those we have passed upon, and will not arise upon another trial of the case, and we deem it unnecessary to extend this opinion by stating and deciding them.

There is also error assigned as to the alleged misconduct of the judge trying the case, in sending an instruction to the jury during their deliberation without the knowledge or consent of counsel.

There were interrogatories submitted to the jury, and during their deliberation they addressed a note to the judge stating that "an interrogatory propounded embraced two questions, one of which might be answered yes, and one no, and asking whether they were bound to answer the whole question yes or no." The court wrote on the communica-

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tion from the jury, and returned it to them through the bailiff, saying: "You should answer the question according to the evidence, and, if the evidence warrants it, you may answer part of the question yes and part no." This was a proper instruction to the jury, but should have been given by calling the jury into open court.

It is evident the honorable judge trying the cause had no wrong intention, and it no doubt occurred during a recess of the court at a time when counsel were not accessible, and with the belief that no harm could result from it, but it is a practice not commendable. Communications ought not to be had between court and jury except in open court, unless by the consent of counsel representing the parties to the cause. It will not occur in the re-trial of the cause, and it is unnecessary to pass upon the question as to whether it was error in this instance.

For the error herein stated, in sustaining objections to the questions propounded to appellee and excluding the testimony, the judgment must be reversed.

Judgment reversed, with costs, with instructions to the court below to sustain the motion for a new trial.

Filed Feb. 15, 1889.

Connors v. The State.

No. 14,672.

117	347
129	295

CONNORS v. THE STATE.

CRIMINAL LAW.—Assault and Battery.—House of Public Entertainment.—Liquor Shop.—A shop for the sale of intoxicating liquors is, in a sense, a house of public entertainment, and if the proprietor strikes one whom he has ordered from his premises, and who is guilty of no misconduct justifying his forcible expulsion, he is guilty of assault and battery.

From the Delaware Circuit Court.

J. R. McMahan and *E. M. White*, for appellant.

L. T. Michener, Attorney General, and *J. H. Gillett*, for the State.

MITCHELL, J.—Thomas Connors was found guilty of an assault and battery upon the person of Phillip Likens. He asks a reversal of the judgment on the evidence.

The evidence given on behalf of the State shows that the appellant was the proprietor of a saloon in which intoxicating liquors were sold and drank. On the 25th day of August, 1887, Likens, Harris and Carmichael were in the saloon. The latter treated his associates, and a question arose between him and the proprietor as to the amount of change due, or the denomination of a coin received by the appellant from Carmichael. The latter appealed to his comrades, who corroborated his assertion that he had laid down a half-dollar, and not a quarter, as the appellant asserted. Thereupon the appellant ordered Likens out of the saloon, the latter saying he would depart as soon as he lighted his cigar. He was told a second time to go out, and while apparently in the act of starting, the appellant struck him three blows with a "bung-starter," a kind of mallet. The blows were not severe, but in the act of warding them off and protecting himself from threatened injury, the prosecuting witness was delayed from going out, as seems to have been his purpose, without resistance.

Hamilton v. The State, ex rel. Harris.

Likens was in the appellant's saloon apparently engaged in the business ordinarily transacted there. For that purpose the place was, in a sense, a house of public entertainment, and upon the evidence, as given in behalf of the State, Likens was guilty of no misconduct justifying his forcible expulsion.

We can not interfere with the verdict and judgment.

The judgment is affirmed, with costs.

Filed Feb. 15, 1889.

No. 13,525.

HAMILTON v. THE STATE, EX REL. HARRIS.

BASTARDY.—*Motion for New Trial.*—*Damages.*—In a bastardy suit, the action of the court fixing the amount to be paid by the defendant is a part of the proceedings and judgment of the court after the trial has been concluded, and the question as to the damages being excessive can not be raised by a motion for a new trial.

From the Benton Circuit Court.

D. E. Straight and *U. Z. Wiley*, for appellant.

M. H. Walker and *I. H. Phares*, for appellee.

OLDS, J.—This is a prosecution for bastardy. Trial had at the September term, 1886, of the Benton Circuit Court, and a verdict finding the appellant to be the father of the child. The cause was continued until the November term, 1886. At the November term the relatrix suggested the death of the child, and witnesses were produced and testified as to the expense of keeping the child during its lifetime, it having lived eighteen weeks, and to the value of the physi-

Wright v. Anderson.

cian's services for treating it. The court fixed the amount to be paid by the appellant at \$200, payable in instalments.

Appellant then made a motion for a new trial, assigning as reasons that "the finding and decision of the court are not sustained by sufficient evidence;" that "the finding and decision of the court are not sustained by sufficient evidence and are contrary to law;" that "the damages are excessive, being too large."

It has been held by this court that the action of the court fixing the amount to be paid by the defendant in a bastardy suit is not a matter occurring at the trial, but a part of the proceedings and judgment of the court after the trial has been concluded, and the question as to the damages being excessive can not be raised by a motion for a new trial. *McIlvain v. State, ex rel.*, 80 Ind. 69; *Scott v. State, ex rel.*, 102 Ind. 277.

There is no question presented for the decision of this court.

Judgment affirmed, with costs.

Filed Feb. 16, 1889.

117	349
121	438
117	349
129	189

No. 13,607.

WRIGHT v. ANDERSON.

PLEADING.—*Answer*.—*Cross-Complaint*.—A pleading, though denominated an answer, will be regarded as a cross-complaint if facts are alleged therein which authorize the granting of affirmative relief.

RES ADJUDICATA.—An adjudication once had between the parties bars all future litigation, not only as to what has been actually litigated and determined, but as to all matters within the issues that might have been litigated and determined in the action.

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SAME.—Merger.—Where the gravamen of the action is one entire, indivisible contract or wrong, the doctrine of merger applies, and when the action is once brought, tried and determined, all causes of complaint are forever cut off, whether embraced within the issues or not.

From the Rush Circuit Court.

J. H. Mellett and *E. Bundy*, for appellant.

B. L. Smith and *W. J. Henley*, for appellee.

BERKSHIRE, J.—The appellant was the plaintiff and the appellee the defendant in the court below. The complaint is in three paragraphs.

Separate demurrers were addressed to the second and third paragraphs, the cause of demurrer being want of facts sufficient to constitute a cause of action. The demurrers were sustained and proper exceptions saved.

An answer in two paragraphs was filed, the first of which was the general denial.

A demurrer was addressed to the second paragraph of the answer, the cause of demurrer being want of facts sufficient to constitute a defence to the action. The demurrer was overruled and the proper exception saved.

A reply was then filed, in two paragraphs, the first paragraph being the general denial.

A demurrer was addressed to the second paragraph of reply, the cause of demurrer being want of facts sufficient to constitute a good reply to the answer. The demurrer was sustained and the proper exception saved. The appellee then withdrew the first paragraph of his answer, and the appellant the first paragraph of his reply, and the court rendered judgment for the appellee for want of a reply.

There are four errors assigned :

1. The court erred in sustaining the demurrer to the amended second paragraph of the complaint.
2. The court erred in sustaining the demurrer to the third paragraph of the complaint.

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3. The court erred in overruling the demurrer to the second paragraph of the answer.

4. The court erred in sustaining the demurrer to the second paragraph of the reply.

The first paragraph of the complaint was a common count for money had and received by the appellee for the use of the appellant, and as the facts alleged in the second and third paragraphs were provable under the first paragraph, it is probable that there is no available error because of the action of the court in sustaining said demurrers.

The second paragraph of the answer is as follows: "Said defendant for further answer says that, at the April term, 1883, of the circuit court of Henry county, Indiana, the defendant herein, James W. Anderson, filed in said court his complaint in which he alleged that this plaintiff, on the 2d day of August, 1882, by his certain promissory note, promised to pay to the order of A. F. Yetter, December 25th, 1882, the sum of \$150, with eight per cent. interest from date, and attorney's fees, which said note the said Yetter endorsed in blank to the said Anderson, and alleging that said note was due and unpaid, and demanding judgment thereon for \$200; that process was issued upon said complaint and served upon said Wright to appear in said court and answer said complaint; that said Wright appeared and filed his cross-complaint in words and figures as follows: 'The defendant for answer to said complaint says: 1st. That said note mentioned and set forth in plaintiff's complaint was given to the plaintiff in part consideration for a tract of land sold and conveyed by the plaintiff, Anderson, to the defendant, James Wright, and that the defendant Yetter endorsed the same for the accommodation and as surety for said Wright only, and without other consideration; that, at the time of the execution of the said note and during his natural life prior thereto, the defendant, Wright, was very weak and feeble in mind, and not able to read or write or to comprehend the meaning and force of deeds, notes or other

Wright v. Anderson.

SAME.—Merger.—Where the gravamen of the action is one entire, indivisible contract or wrong, the doctrine of merger applies, and when the action is once brought, tried and determined, all causes of complaint are forever cut off, whether embraced within the issues or not.

From the Rush Circuit Court.

J. H. Mellett and *E. Bundy*, for appellant.

B. L. Smith and *W. J. Henley*, for appellee.

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Wright v. Anderson.

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written instruments, and was wholly ignorant of the value of real estate, or the difference in values or quality thereof; that a short time before the execution thereof of said note, the said Wright had come into the possession of property and money, by descent from a deceased brother, to the amount and value of \$1,800, all of which facts the said Anderson and his agents prior to and at the time of the execution of said note well knew, and then and there knowing the same, and for the purpose of and with the intent to defraud and cheat the said Wright out of his estate so inherited as aforesaid, then and there to induce him to purchase the same at the price, represented to him that a certain tract of land situated in Decatur county, Indiana, and described as eighty acres off of the north end of one hundred and twelve acres as deeded by Henry Stout and wife to John A. Maddox, July 7th, 1866, said lands being in sections 8 and 9, town. 8, range 9, in said Decatur county, was of the value of one thousand six hundred dollars, and that the plaintiff (said Anderson), had a good and perfect title thereto, and by means of said representations induced and caused the said Wright to purchase the said land from the plaintiff, the said Anderson, at and for the sum of \$1,600, and then and there obtained from the said Wright the sum of \$400 in cash and the note mentioned in the complaint, and other notes mentioned in the complaint, amounting in the aggregate to the sum of \$1,600; that the said Wright, in making said purchase, relied wholly upon the judgment and representations of the plaintiff (said Anderson) and his agents, and believed them to be true; that, in truth and in fact, said land was and is only of the value of \$500, and the title thereto is imperfect, defective and unsalable, of which the plaintiff and his agents at the time well knew; and the said Wright now brings into court a deed of conveyance, reconveying said land to said plaintiff, and demands that said contract be rescinded; that the plaintiff filed a certain reply in said cause, denying each and every material allegation con-

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tained in said answer, and upon said issues so joined as aforesaid in said court, said cause was tried and a finding was made in favor of said Wright, and thereupon it was ordered, adjudged and decreed by said court that the contract between said Anderson and said Wright, concerning the purchase of said real estate, be rescinded, set aside, and made null and void, and of no effect; and it was further adjudged, ordered and decreed by the court in said cause, that said James Wright recover of said Anderson his costs and charges laid out and expended; that said judgment is in full force and effect, and this defendant avers that the money sued for in the plaintiff's complaint is a part of the purchase-price of the land in Decatur county, the contract for the sale of which was rescinded in the said Henry Circuit Court, and the defendant avers all the matters arising out of said contract so made, as set up in the said Wright's answer filed in the Henry Circuit Court, were, or might have been, adjudicated, determined and settled in said suit between said parties in said court. Wherefore he demands judgment for costs, and all proper relief."

It is contended by appellant that the pleading which he filed in the former action, and which is set out in the foregoing answer, was but an answer, while the appellee contends that it was a cross-complaint.

The pleading styles itself an answer, and the appellee, in his answer, calls it an answer, but to determine its character we must look at its substance, and not at the name given to it.

It was something more than an answer, otherwise the appellant would only have been entitled to such relief under it as would have barred a recovery in the action. It concludes with a prayer for affirmative relief, and the court granted affirmative relief.

The pleading was what is styled and recognized by the statute as a counter-claim.

"A counter-claim is any matter arising out of or connected

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with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages." R. S. 1881, section 350.

The matters alleged in the pleading were connected with the cause of action, and might have been the subject of an action in favor of the appellant.

The theory of the appellee's answer is, that, the appellant having filed a pleading in response to the complaint, in which he sought and obtained affirmative relief, the adjudication bars a recovery in the present action, as the subject-matter of the action arises out of the same transaction as did the subject-matter of the former action.

An adjudication once had between the parties bars and cuts off all future litigation, not only as to what was actually litigated and determined, but as to all matters that might have been litigated and determined in the action. This is the established doctrine of this court from the beginning. *Fischli v. Fischli*, 1 Blackf. 360; *Richardson v. Jones*, 58 Ind. 240; *Elwood v. Beymer*, 100 Ind. 504; *Vail v. Rinehart*, 105 Ind. 6; *Kurtz v. Carr*, 105 Ind. 574; *Wilson v. Buell*, ante, p. 315.

These authorities, however, must be understood as having reference to such matters as are within the issues. *Columbus, etc., R. R. Co. v. Watson*, 26 Ind. 50; *Davenport v. Barnett*, 51 Ind. 329; *Sauer v. Twining*, 81 Ind. 366; *Stringer v. Adams*, 98 Ind. 539; *Moore v. State, ex rel.*, 114 Ind. 414.

There is another class of cases to which the doctrine of merger is applied, and when an action is once brought, tried and determined, all causes of complaint are forever cut off, whether embraced within the issues or not. *Freeman Judgments*, sections 240 and 372; *Henderson v. Henderson*, 3 Hare, 100; *City of North Vernon v. Voegler*, 103 Ind. 314; *Richardson v. Eagle Machine Works*, 78 Ind. 422 (41 Am. R. 584).

This is a class of cases where the gravamen of the action

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is one entire, indivisible contract or wrong. In such cases the law will not allow the plaintiff to split up the various covenants or injuries and bring separate actions, but merges the contract or tort into the judgment.

But in the case under consideration we do not think the cause of action was embraced within the issues in the former action; nor are we of the opinion that there was a merger. The counter-claim charged a fraud, and demanded a rescission of the contract because of the fraud.

To a complete rescission of the contract the cause of action involved in this suit was in no way material. The right of rescission depended entirely upon the fraud charged, and the offer to put the appellee *in statu quo*. Until the contract was rescinded by a decree of the court, the appellant could not enforce collection of the money now sued for.

The right of rescission was an equitable right, but the right which the appellant now seeks to enforce is a legal right.

As all distinctions between law and equity are abolished by our code of practice, the appellant might have made the allegations of his counter-claim broad enough to have enabled him to recover the money he now sues for in the former action, but he was not required to do so.

The right of action involved in this suit was in no way before the court in the former action, and, under the issues, could not have been considered and determined.

The second paragraph of the answer was clearly bad, and the court should have sustained the demurrer to it.

As the answer is bad we are not called upon to consider the reply.

The judgment is reversed, with costs, with directions to the court below to sustain the demurrer to the second paragraph of answer.

Filed Feb. 16, 1889.

Wilson v. Donaldson.

No. 10,640.

WILSON v. DONALDSON.

117	356
130	677

NON-RESIDENT.—*Attendance at Trial.—Service of Summons Upon.*—A person who comes into this State for the purpose of testifying as a witness in an action in which he is a party, can not be legally served with a summons at the suit of the party plaintiff in the action he came here to defend. Section 312, R. S. 1881, does not apply to such a case.

From the Montgomery Circuit Court.

G. W. Paul, M. D. White and J. E. Humphries, for appellant.

P. S. Kennedy, S. C. Kennedy and W. T. Brush, for appellee.

ELLIOTT, C. J.—The appellee was served with summons in an ordinary civil action. He pleaded in abatement these facts: That he then was and had been for more than eighteen years a citizen and resident of the State of Kentucky; that during the April term of the Montgomery Circuit Court he left his home in the State of Kentucky for the sole purpose of defending an action pending against him in that court, and testifying as a witness therein; that the action was brought against him by the plaintiff, and the cause was called for trial on the 24th of May, 1882; that the defendant announced that he was ready for trial and the court ordered the trial to proceed, whereupon the plaintiff dismissed his action, and withdrew all the papers from the files of the court; that immediately after the dismissal was entered, Wilson, the plaintiff, refiled his complaint and caused a summons to issue; that the defendant started home at once but was served with summons while he was on his way home, although he was still in Montgomery county.

The contention of appellant's counsel is, that the fact that the appellee was in Indiana in attendance upon court as a party

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to an action which he had brought against him, and for the purpose of testifying as a witness, does not entitle him to avoid the summons served upon him while in this State. Our statute is broad enough to sustain this contention if we take it apart from all the other rules of the law, for it provides that in cases of non-residents an action may be commenced and summons served in any county where they may be found. R. S. 1881, section 312. But a statute is not to be isolated from the great body of law of which it forms a part; on the contrary, it is to be taken as forming part of one great system, and is to be construed with reference to co-ordinate rules and statutes. *Bradley v. Thixton, ante*, p. 255.

The counsel are, therefore, in error in completely isolating the statutory provision we have referred to, since if we should find a well established principle of law exempting non-residents who are in this State for the purpose of attending court as parties or witnesses, we should be bound to construe the statute with reference to that principle, for we could not hold that the Legislature meant to entirely disregard it and establish an independent rule. Such narrow views as those of counsel, if allowed sway, would mar the symmetry of our system of jurisprudence and greatly impair its usefulness. Laws are necessarily expressed in general terms, but these general terms do not and can not embrace all cases. An element is often present which takes a case out of the operation of the general words of the statute, and that element is here present. *Broom Legal Maxims*, 43.

We can not, as the appellee's counsel urge us to do, allot any controlling force to section 2658 of the statute, which exempts persons engaged in necessary attendance upon courts from arrest on civil process, for the reason that there was no attempt to arrest the appellee. All that the appellant attempted to do was to compel the appellee to appear and answer in an ordinary civil action.

The fact that an arrest is not, under our system of jurisprudence, made on ordinary civil process, supplies a substan-

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tial reason for denying to the ancient decisions a controlling influence, but not for entirely impeaching the validity of their reasoning. There are strong reasons found in some of the old cases why a citizen of a sister State who comes here to defend one action should not be bound to submit to the service of a summons in another action while here in necessary attendance at court. It is his privilege, under our laws, to testify in his own behalf, and this privilege should not be burdened with the hazard of defending other actions in our forums. Our own citizens will often derive a substantial benefit from the personal appearance of a non-resident defendant, since it may enable them to obtain a personal judgment which else were impossible. If citizens of other States are allowed to come into our jurisdiction to attend court as parties or witnesses and to freely depart from it, the administration of justice will be best promoted, since a defendant's personal presence is often essential to enable his counsel to justly conduct his defence. The principle of State comity, too, demands that a citizen of another State who submits to the jurisdiction of our courts and here wages his forensic contest should not be compelled to do so under the limitation and obligation of submitting to the jurisdiction of our courts in every case that may be brought against him. While coming and departing, as well as while actually in necessary attendance at court, he should be free from the hazard of being compelled to answer in other actions.

It is an evidence of respect for our laws and confidence in our courts that he comes here to litigate, and the laws he respects should give him protection. If he can come only under the penalty of yielding to our jurisdiction in every action that may be brought against him, he is deprived of a substantial right because he is willing to trust our courts and our laws, without removing his case to the Federal courts, or refusing to put himself in a position where personal judgment may be rendered against him. High considerations of public policy require that the law should encourage him to

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freely enter our forums by granting immunity from process in other civil actions, and not discourage him by burdening him with the obligation to submit to the writs of our courts if he comes within our borders. We know that there is some conflict among the decided cases, but, in weight and in reason, the authorities range themselves in strong array in support of the doctrine we have outlined. It was certainly the ancient rule, and, although, as we have said, something of the reason for the ancient rule has been dissipated, there yet remains much reason for it. There is, indeed, a stronger reason for the rule in States, where, like ours, parties may be witnesses, than in States where the old common law rule excluding them prevails; and for this reason the old rule protecting witnesses has much more strength in States where parties may be witnesses than in States where the ancient common law rule is still in force. The authorities, ancient and modern, are in substantial harmony upon the proposition that a witness from a foreign jurisdiction is under the protection of the law, although some of the cases deny this immunity to parties. The reason for this rule regarding witnesses, as generally given, is, that, as they can not be compelled to leave their own State, they should, as far as possible, be encouraged to voluntarily come into the State where the action is pending, and give their testimony in open court. But the policy of protection, as sound principles require, and many courts assert, extends as well to parties as to witnesses.

In *Mitchell v. Huron Circuit Judge*, 53 Mich. 541, COOLEY, C. J., said: "We think the case is within the principle of *Watson v. Judge of Superior Court*, 40 Mich. 729, and that the writ should issue. Public policy, the due administration of justice, and protection to parties and witnesses alike demand it. There would be no question about it if the suit had been commenced by arrest; but the reasons for exemption are applicable, though with somewhat less force, in other cases also. The following cases may be referred to for the general reasons: *Norris v. Beach*, 2 Johns. 294; *Sanford*

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v. *Chase*, 3 Cow. 381; *Dixon v. Ely*, 4 Edw. Ch. 557; *Clark v. Grant*, 2 Wend. 257; *Seaver v. Robinson*, 3 Duer, 622; *Person v. Grier*, 66 N. Y. 124; *Matthews v. Tufts*, 87 N. Y. 568; *Hall's Case*, 1 Tyler, 274; *In re Healey*, 53 Vt. 694; *Miles v. McCullough*, 1 Binn. 77; *Halsey v. Stewart*, 4 N. J. L. 366; *Dungan v. Miller*, 37 N. J. L. 182; *Vincent v. Watson*, 1 Rich. Law, 194; *Sadler v. Ray*, 5 Rich. Law, 523; *Martin v. Ramsey*, 7 Humph. 260; *Dickinson's Case*, 3 Harr. (Del.) 517; *Henegar v. Spangler*, 29 Ga. 217; *May v. Shumway*, 16 Gray, 86; *Thompson's Case*, 122 Mass. 428; *Ballinger v. Elliott*, 72 N. C. 596; *Parker v. Hotchkiss*, Wall. C. C. 269; *Juneau Bank v. McSpedan*, 5 Biss. 64; *Arding v. Flower*, 8 Term R. 534; *Newton v. Askew*, 6 Hare, 319; *Persse v. Persse*, 5 H. L. Cas. 671. See, also, *Matter of Cannon*, 47 Mich. 481. The case of *Case v. Rorabacher*, 15 Mich. 537, is different. In that case the party claiming the privilege was attending court within the jurisdiction of his residence."

Very much the same ruling as that announced by Chief Justice COOLEY was made by the Court of Appeals of New York, in *Matthews v. Tufts*, *supra*, where it was said: "In *Van Liew v. Johnson*, decided March, 1871, and referred to in *Person v. Grier*, 66 N. Y. 124, a majority of this Court were of opinion that a summons could not be served upon a defendant, a non-resident of the State, while attending a court in this State as a party. This immunity does not depend upon statutory provisions, but is deemed necessary for the due administration of justice. It is not confined to witnesses, but extends to parties as well, and is abundantly sustained by authority."

We do not cite the authorities adduced by the court, for the reason that most of them are collected in the quotation made from the opinion of Chief Justice COOLEY.

Mr. Rorer says: "It is the policy of the law to protect suitors and witnesses from service of process in civil actions, whether the process be such as required their arrest, or be

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merely in the nature of a summons. Service in such cases will be set aside, as well upon general principles as upon positive law, if there is such." Rorer Interstate Law, 26.

The only case cited by the appellant's counsel which directly opposes the opinion which we accept as the correct one, is that of *Bishop v. Vose*, 27 Conn. 1, and that decision is not supported by authority, nor are any satisfactory reasons assigned for the conclusions of the court. *Greer v. Young*, 120 Ill. 184, was the case of a party who came into Illinois to attend the taking of depositions, and not the case of a defendant in attendance at court.

In *King v. Phillips*, 70 Ga. 409, there was no pleading questioning the service, and it was on this point that the case was decided.

The facts in *Robbins v. Lincoln*, 27 Fed. Rep. 342, were, that the person served with process was an attorney and not a party.

In *Smith v. Jones*, 76 Maine, 138 (49 Am. Rep. 598), the question arose in a collateral action, and there the plaintiff sued to recover damages for an illegal arrest. *Catlett v. Morton*, 4 Litt. (Ky.) 122, simply decides that a member of the Legislature is not so far privileged as to be exempt from answering a summons in an ordinary civil action.

Our ultimate conclusion is, that a person who comes into this State for the purpose of testifying as a witness in an action in which he is a party, can not be legally served with a summons at the suit of the party plaintiff in the action he came here to defend, and that our statute does not apply to such a case.

Judgment affirmed.

Filed Feb. 16, 1889.

Bailey et al. v. Briant.

No. 13,563.

BAILEY ET AL. v. BRIANT.

CONVEYANCE.—*Pending Proceedings to Condemn.—Grantee Entitled to Damages Awarded.—Parol Reservation.—Evidence.*—A purchaser, to whom city lots are conveyed by warranty deed while a proceeding to condemn a portion thereof for street purposes is pending, is entitled to recover from the grantor any damages that may be awarded in the latter's name, and paid to him by the city by reason of the condemnation, and the grantor will not be permitted to prove by parol that he reserved the damages at a date prior to the execution of the deed.

From the Huntington Circuit Court.

J. C. Branyan, M. L. Spencer, R. A. Kaufman and W. A. Branyan, for appellants.

B. F. Ibach and J. G. Ibach, for appellee.

COFFEY, J.—On the 3d day of January, 1883, the appellee conveyed to the appellants, by warranty deed, lots fifty-five and fifty-six in Louis Heitzfield's addition to the city of Huntington, Huntington county, Indiana.

At that time a proceeding was pending by the city of Huntington to condemn a portion of said lots for the purpose of widening Franklin street. Such proceedings were had as that, on the 24th day of September, 1883, sixteen feet off the north end of said lots was condemned and taken for street purposes, and \$120 damages were awarded to the owners of the lots by reason of such condemnation. The money was paid over by the city treasurer to the appellee, and this suit is prosecuted by the appellants to recover the same.

On the trial of the cause the appellee testified in his own behalf. His counsel propounded to him the following question :

"State what agreement or conversation, if any, there was between you and the plaintiffs as to any amount of damages

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which might be assessed upon the widening of the street on which these lots abut—as to who should receive the same?”

To this question the appellants objected, and stated to the court, as the reasons for such objection, that such agreement, if made, was merged in the deed; that the defendant could not reserve the land itself by parol, and that this was an attempt to contradict the deed. The court overruled the objection, and the appellants excepted.

The appellee then testified, in substance, that, while talking with appellants about the purchase and sale of the lots, he stated that the street was about being widened, and if it were, it would take ten or fifteen feet of the lots; that he (witness) had lots on the other side of the street, and if the appellants wanted any damages he would not sell.

The appellants assigned this ruling of the court as a reason for a new trial, and now assign in this court as error the action of the circuit court in overruling their motion for a new trial.

There is a class of cases in which it is held that a parol reservation may be made, but they all relate to growing crops and trade fixtures, or such other articles as are not permanently attached to the land. *Heavilon v. Heavilon*, 29 Ind. 509; *Harvey v. Million*, 67 Ind. 90.

But the rule is never extended to such things as pertain to and form or constitute a permanent part of the realty. *Armstrong v. Lawson*, 73 Ind. 498.

At the date of the deed executed by the appellee to the appellants, the strip of land subsequently taken for a street constituted a part of the lots conveyed.

This strip undoubtedly passed by the deed to the appellants, and became their property. The condemnation took place long afterwards, and at the time the assessment of damages was made the property was the property of the appellants. It follows, we think, that the money paid for the use of this strip of land for the purpose of a street became the money of the appellants, and the appellee could not be per-

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mitted to prove by parol that he reserved the same at a time prior to the date of the deed.

We are of the opinion that the court erred in admitting this evidence.

The appellee assigns as a cross-error that the court erred in overruling his demurrer to the complaint.

As we understand the argument of the appellee, it is, as the damages were assessed in his name, and as the appellants did not appeal, that, therefore, they can not recover in this action. However strong the argument might be when addressed to the complaint as a cause of action against the city treasurer who paid over the money to the appellee, we do not think it valid as to the cause of action stated against the appellee himself. It must be remembered that the proceedings were pending when the deed was made, and there could be no valid objection to permitting it to proceed to final determination in the name of the appellee; but that would give him no claim to the damages, if, during the pendency of the proceeding, he conveyed the land.

Of course, the appellants, having taken a conveyance during the pendency of the proceeding, were bound by the final condemnation, but that did not deprive them of compensation for their land taken for the purpose of widening the street. In our judgment the complaint states a good cause of action.

For the error of the court in receiving parol testimony of an agreement made prior to the execution of the deed as to the damages thereafter to be assessed, the judgment must be reversed.

Judgment reversed, at the costs of the appellee, with instructions to the circuit court to grant a new trial, and for further proceedings not inconsistent with this opinion.

Filed Feb. 20, 1889.

Smythe v. Boswell *et al*

No. 14,614.

SMYTHE v. BOSWELL ET AL.

APPEAL.—*Time.—Statutory Limitation.—Fraud of Appellee Preventing Appeal.*

—An appeal can not be taken after the time limited by statute, unless the fraud of the appellee or his counsel prevented it from being perfected within the proper time, in which case the Supreme Court, by virtue of its inherent power, may grant an appeal upon a proper application.

From the Benton Circuit Court.

N. W. Bliss, T. L. Merrick and H. S. Travis, for appellant.

H. W. Chase, F. S. Chase and F. W. Chase, for appellees.

ELLIOTT, C. J.—The judgment from which this appeal is prosecuted was rendered on the 5th day of September, 1887. On the 11th day of October, 1888, the transcript was filed in the office of the clerk of this court. The transcript contains an assignment of errors and a joinder in error, but there was neither a transcript nor an assignment of errors filed in this court until the 11th day of October, 1888, more than thirteen months after the final judgment was entered. The appellees move to dismiss the appeal.

Affidavits and counter-affidavits were filed by both parties, but we think that the utmost effect that can be given the affidavits of the appellant is, that they tend to prove that her counsel believed that there was a tacit agreement extending the time for taking the appeal beyond the year allowed by law. On the other hand, the affidavits filed by the appellees tend very strongly and satisfactorily to prove that there was no foundation even for this belief. They tend, indeed, to show that the appellees insisted upon the filing of the transcript long before the year expired. There is, at all events, not the slightest ground for inferring that the appellees or their counsel acted in bad faith, or that they wrongfully deceived the appellant or her counsel.

117	365
117	599
118	86
118	355
118	366
129	453
117	365
126	545
117	365
129	976
117	365
130	209
117	365
131	3
133	289
117	365
136	59
117	365
147	137
117	365
164	627
117	365
165	645

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The motion to dismiss the appeal must be sustained. An appeal must be perfected within the time limited by the statute. It is true that the judiciary is an independent department of government, exclusively invested by the Constitution with one element of sovereignty, and that this court receives its essential and inherent powers, rights and jurisdiction from the Constitution and not from the Legislature. *Kuntz v. Sumption*, ante, p. 1; *Little v. State*, 90 Ind. 338 (46 Am. Rep. 224); *Houston v. Williams*, 13 Cal. 24.

This fundamental principle leads, as we are satisfied, to the proposition that if an appeal within the time limited by law should be prevented by the fraud of an appellee or his counsel, the court might, notwithstanding the statutory limitation, grant an appeal upon a proper application. This power, to put the doctrine in a somewhat different form, exists, not by virtue of legislation, but by virtue of the inherent right of every superior court to maintain its dignity and independence, and to control its process and maintain its inherent jurisdiction. Upon this point the current of judicial opinion is smooth and clear. *Nealis v. Dicks*, 72 Ind. 374; *Cavanaugh v. Smith*, 84 Ind. 380; *Shoultz v. McPheeters*, 79 Ind. 373; *Sanders v. State*, 85 Ind. 318; *Gregory v. State, ex rel.*, 94 Ind. 384; *Greenough v. Greenough*, 11 Pa. St. 489; *Chandler v. Nash*, 5 Mich. 409. But the case as it is presented to us is not one calling into exercise the inherent power of the court, but is one in which the appellant has failed to file a pleading or record in this court within the time limited by positive law.

It is unquestionably true that the Legislature may limit the time within which appeals may be taken. The limitation operates primarily upon the parties, but it also binds the court, because it is a rule of procedure established by valid legislation. Our decisions are, therefore, right in holding that an appeal must be taken within the time limited by the statute, and that, unless the transcript and the assignment of errors are filed within that time, there is no cause in this

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court. *Wright v. Manns*, 111 Ind. 422; *Bacon v. Withrow*, 110 Ind. 94; *Johnson v. Stephenson*, 104 Ind. 368; *Flory v. Wilson*, 83 Ind. 391; *Harshman v. Armstrong*, 43 Ind. 126; *Jenkins v. Corwin*, 55 Ind. 21; *Anderson v. Mitchell*, 58 Ind. 592; *Henderson v. Halliday*, 10 Ind. 24; *Hollingsworth v. State, ex rel.*, 8 Ind. 257.

Our decisions are sustained by those of other courts. 1 Am. and Eng. Encyclopædia of Law, 621. It may be that the reasoning of the court in some of the cases is not entirely sound, yet the conclusion reached is undoubtedly right.

In order to entitle the appellant in such a case to relief from his own failure to obey the law, he should show a clear and meritorious case, for otherwise the law must take its course. Appellees have a right to demand that appeals be taken within the time limited by law, and of this right they should not be deprived unless they have been guilty of some wrong.

This is not a case of a failure to comply with a rule of court, but is a case of a failure to obey a mandatory statute. It is not a mere technical right that the appellees insist upon, for they base their claim on a statutory command. This is not a case where some default occurs after the case gets into court, for here there was an utter failure to get the case into court within the time fixed by law.

Appeal dismissed.

Filed Feb. 19, 1889.

Ward v. Voris.

No. 14,145.

WARD v. VORIS.

117	308
129	280
117	368
141	151
117	368
158	373
117	338
1171	102

NEW TRIAL.—*Newly Discovered Evidence.*—To entitle a party to a new trial on account of newly discovered evidence, it must be shown that such evidence could not, with reasonable diligence, which must be shown, have been discovered and produced at the trial, and that it is true.

SAME.—*Diligence.*—A party seeking a new trial on the ground of newly discovered evidence must affirmatively show facts that will constitute diligence; and if he has made no effort to ascertain or procure the evidence, he must show an absence of knowledge of facts and circumstances which require him to make inquiry, and such a state of facts as will excuse his inactivity.

From the Montgomery Circuit Court.

P. S. Kennedy, S. C. Kennedy, T. H. Ristine and H. H. Ristine, for appellant.

J. E. Humphries, M. D. White and W. E. Humphries, for appellee.

OLDS, J.—This was a suit on a promissory note. The defendant filed pleas in payment, one alleging payment in money, and one alleging payment in certain articles of personal property. Finding and judgment for the plaintiff, the appellee. Motion for a new trial filed and overruled by the court, and exceptions reserved by the appellant.

The question presented and discussed is, whether the appellant was entitled to a new trial on account of newly discovered evidence.

The main controversy in the case was between the payor of the note, the appellant, Ward, and the payee of the note, one Wilkins, who had sold and assigned the note to the appellee, as to certain credits.

Some question is made by counsel for appellee in regard to the evidence taken by the short-hand reporter being any part of the record in this case. The evidence so taken by the re-

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porter is transcribed in long-hand and incorporated bodily into the bill of exceptions, filed in the clerk's office and incorporated into the record, as required by section 1410, R. S. 1881.

The motion for a new trial, on the ground of newly discovered evidence, was filed at the same term of the court at which the case was tried, and is supported by the affidavits of the appellant, Ira Stout and Mrs. Ann Kirkpatrick.

Appellant, in his affidavit, says that "since the trial he has obtained newly discovered evidence material to his defence, which he could not, with reasonable diligence, have discovered and produced at the trial; that, upon the trial of said cause, the only question was as to the amount of property which this defendant had furnished to Clinton Wilkins, the assignor of the note sued upon, and to his son, Thomas Wilkins; that a large number of items testified to by defendant were denied by said Clinton Wilkins, and were excluded in the computation, as not being proved, and by reason of the loss of certain books, as testified to by defendant, other matters were not stated; but defendant says that upon a trial for divorce between said Clinton Wilkins and his wife, at the May term, 1884, of said court, the amount due upon this note was being ascertained in order to fix the amount of alimony, and the only sum which said Wilkins named as due upon said note was one hundred dollars; that affiant is informed that he was asked to give his best impression as to the sum due upon said note, and he said it might be one hundred dollars, and it might be more or less, and he files herewith the affidavits of one Ira Stout and Ann Kirkpatrick, who heard said fact testified to upon said trial; that affiant was not present at said trial, and did not know that said matter was inquired of in said cause, and that he had no reason to suppose that said affiants knew said facts until since the trial of the case at the September term of this court, 1887."

Ira Stout, in his affidavit, says that he was present at the

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trial of the divorce case, and that the note Wilkins held against appellant, being the note sued upon in this case, was inquired about, and Wilkins testified that he had had dealings with appellant for years since the execution of the note, and had received from said appellant stock, tile, lumber and other property, and that his son, Thomas, had received horses and stock and other property, all of which articles were to go as credits upon said note, and that he could not tell just what was due; it might be one hundred dollars and it might be more.

Ann Kirkpatrick, in her affidavit, states that she heard Wilkins testify on the divorce trial, and that he said he and his son had received property as stated by Stout, which was to be applied as credits on the note, and that he said he could not state the sum due on the note with exactness, but his best impression was that it was only one hundred dollars; that it might be something more and it might be less.

To entitle a party to a new trial on account of newly discovered evidence, it must be shown that such evidence could not, with reasonable diligence, have been discovered and produced at the trial, and that the same is true, and the facts must be set out showing the diligence used to procure such evidence.

No facts are stated in the affidavit of the appellant in this case showing any diligence. The affidavit states a conclusion, that the affiant "could not, with reasonable diligence, have discovered and produced such evidence on the trial."

It is also stated in the affidavit that the affiant was not present at the trial of the divorce case, and did not know that said matter was inquired of; but it does not negative the fact that he was a neighbor to Wilkins, and knew all about the trial, and if he was, he was bound to know that the question of the husband's property was a matter of inquiry in a trial for divorce.

For aught that appears from the affidavit of the appellant, he may have known all about the trial of the divorce case,

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and was related to, and associated with, the persons Stout and Kirkpatrick daily, and had ample opportunity to converse with them and ascertain the facts which they would testify to, long before the trial in this case.

The question of payment was an issue in the case, disputed and contested. It was the duty of the appellant to make diligent inquiry before the trial, and produce all the evidence that such diligence would put him in possession of, and if he failed to do so, he can not be relieved of a judgment which he has allowed to go against him by reason of his own laches and inattention to his own interests.

A party asking to be relieved of a judgment must affirmatively show facts that will constitute diligence, and if he has made no efforts to ascertain or procure such evidence, he must show an absence of knowledge of facts and circumstances which require him to make inquiry, and show such a state of facts as justify and excuse his inactivity. *Test v. Larsh*, 100 Ind. 562; *McCauley v. Murdock*, 97 Ind. 229; *Ragsdale v. Matthews*, 93 Ind. 589; *Toney v. Toney*, 73 Ind. 34; *Du Souchet v. Dutcher*, 113 Ind. 249; *Arms v. Beitman*, 73 Ind. 85; *Allen v. Bond*, 112 Ind. 523; *Gardner v. State, ex rel.*, 94 Ind. 489; *Pennsylvania Co. v. Nations*, 111 Ind. 203; *Hines v. Driver*, 100 Ind. 315; *Marks v. State, ex rel.*, 101 Ind. 353.

Counsel for appellant insist that the ruling of the court below can not be sustained without overruling the case of *Rains v. Ballow*, 54 Ind. 79. In that case the question of diligence was not presented to, or considered by, this court. The affidavit in this case is not sufficient to entitle the appellant to a new trial.

There is no error for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed Feb. 19, 1889.

O'Donahue *et al.* v. Creager.

No. 13,605.

O'DONAHUE ET AL. v. CREAGER.

QUIETING TITLE.—*Defences Provable Under General Denial.*—*Special Answer.*—*Demurrer.*—*Practice.*—In suits to quiet title all matters of defence may be proved under the general denial, and hence there is no available error in sustaining a demurrer to special paragraphs of answer, although good.

SAME.—*Adverse Possession.*—*Fraud.*—*Damages.*—*Statute of Limitations.*—Where one went into possession of real estate in 1852, claiming title and holding exclusive possession until 1885, when he conveyed to another, any right which one claiming to be the original owner may have had to quiet title, or for damages for obtaining a fraudulent deed, is barred by the statute of limitations.

SUPREME COURT.—*Failure of Evidence.*—*Reversal of Judgment.*—*Practice.*—A judgment will be reversed and a new trial granted if there is a failure of evidence upon any material point.

From the Daviess Circuit Court.

J. W. Ogdon and *M. F. Burke*, for appellants.

W. R. Gardiner and *S. H. Taylor*, for appellee.

BERKSHIRE, J.—The case as made by the complaint is, in brief, that the maiden name of the appellee was Bridget Grannon, and her father's name Bernard Grannon, who was a brother of the appellant Grannon; that, on the 8th day of April, 1850, while the appellee was but a small child, the appellant Grannon entered and took up, with money of hers and her said father, from the United States government and the trustees of the Wabash and Erie Canal, the following real estate in Daviess county, Indiana, to wit: The northwest quarter of the northwest quarter of section 10, town. 3 north, of range 5 west; that, on the 1st day of June, 1850, the trustees of the Wabash and Erie Canal executed to the appellee a deed for said real estate; that, on the 27th day of February, 1852, the appellant Grannon procured from another Bridget Grannon, with the fraudulent intent to cheat

117	373
121	187
117	372
130	263
130	401
117	372
131	296
117	372
136	637
117	372
158	363
117	372
166	475

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and injure the appellee, a deed of conveyance for the said real estate and certain other real estate, and thereafter and on the 3d day of September, 1885, said appellant Grannon, with the further fraudulent intent to cheat and injure the appellee, sold and by his deed conveyed said real estate, so conveyed to him, to the appellant O'Donahue, for a consideration of \$3,900; that said forty-acre tract was then and still is of the value of \$2,000; that said appellant O'Donahue took the title with full knowledge of all the facts, and that the appellee was the owner of the said forty-acre tract; that he has paid but \$500 of the said purchase-price, the proper proportion of which as applicable to the said forty-acre tract is \$166.66. The prayer for relief is, that the deeds be set aside and the title of the appellee quieted, or if it be found that the appellant O'Donahue is an innocent purchaser for value, that he be required to pay the remainder of said purchase-money to the appellee.

The answer filed by the appellants is in four paragraphs: 1. The general denial. 2. The statute of limitations, that the cause of action did not accrue within six years. 3. The statute of limitations, that the cause of action did not accrue within fifteen years. 4. The statute of limitations, that the cause of action did not accrue within twenty years.

The appellee addressed a demurrer to the second, third and fourth paragraphs, separately assigning as cause of demurrer a want of sufficient facts to constitute a defence to the action; the court sustained the demurrer to each paragraph, and the appellants reserved proper exceptions.

There was a jury trial and the following verdict returned for the appellee:

"We, the jury, find for the plaintiff and assess her damages at \$775."

The following is the judgment rendered by the court:

"It is, therefore, considered by the court that the plaintiff recover of and from the defendants said sum of \$775,

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with interest at six per cent. from this date, and costs of suit herein expended.

"It is further considered by the court that the defendant O'Donahue pay said sum of money and interest and costs to the plaintiff out of the balance of the purchase-money owing from him for the real estate described in the complaint herein, and that, upon payment of the amount of this judgment, he be entitled to credit for the sums so paid on the balance due his co-defendant from him on said real estate."

The appellants assign several errors, as follows :

1. The court erred in sustaining the demurrer to the second, third and fourth paragraphs of answer, and each of said paragraphs.

2. The court erred in overruling the motion for a *venire de novo*.

3. The court erred in overruling the motion for a new trial.

4. The court erred in overruling the motion in arrest of judgment.

The facts stated in the complaint constitute a cause of action to quiet title to real estate, and that only. In actions to quiet title all matters of defence may be proved under the general denial, and, therefore, though it is our opinion that both the third and fourth paragraphs were good, and that the court erred in sustaining the demurrers thereto, the error is unavailable, for the reason that every fact that could have been proved had the demurrers been overruled, was provable under the general denial. *Eve v. Louis*, 91 Ind. 457.

We are unable to see upon what theory the appellee obtained a money judgment; the complaint charged notice home to O'Donahue when he purchased, and the evidence proved that he had paid but a small part of the purchase-money. It must have been upon the idea that the complaint charged a fraud to the damage of the appellee, but no sufficient allegations of fraud are made.

As we have already said, the complaint alleges an action to

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quiet title, and only that. If we were of the opinion that it stated a cause of action arising out of a fraud, then we would have to hold that there was available error because of the ruling of the court in sustaining the demurrers to the several paragraphs of answer. R. S. 1881, section 292; *Pilcher v. Flinn*, 30 Ind. 202; *Wallace v. Metzker*, 41 Ind. 346.

There was no error in overruling the motion for a *venire de novo*, nor in overruling the motion in arrest of judgment. The verdict was in proper form, and the complaint stated a cause of action.

We are, however, of the opinion that the court committed an error in overruling the motion for a new trial.

The motion for a new trial assigns three reasons, one of which is, that there is not sufficient evidence to sustain the verdict.

In what we are about to say we are not unmindful of the long line of decisions that, whenever there is any controversy in the evidence as to matters of fact, the finding of the jury is conclusive, so far as this court is concerned. At the same time we do not overlook the many cases which this court has decided, that, if there is a failure of evidence upon any material point, the judgment will be reversed and a new trial granted. In this case there is a failure of both pleading and evidence.

There is a controversy in the evidence as to whether the conveyance which the trustees of the Wabash and Erie Canal executed to Bridget Grannon on the 1st day of June, 1850, was executed to the appellee or to her grandmother, both of them bearing the same name. As to all other material facts there seems to be no controversy.

The evidence uncontradicted is, that the appellant William Grannon was the uncle of the appellee, and that Bridget Grannon, the grandmother of the appellee, was the mother of William; that the appellee was born in the year 1839; that, on the 27th day of February, 1852, Bridget Grannon, the grandmother, executed to the appellant William Grannon,

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a deed for the real estate in question, together with other lands; that he went into possession thereof about the time of the conveyance, and held exclusive possession of the same under claim of title, continuously, until he conveyed to his co-appellant, O'Donahue, September 3d, 1885; the conveyance to O'Donahue was for all the lands covered by the conveyance from Bridget Grannon, for a consideration of \$3,900, \$500 of which has been paid.

If it is conceded that the appellee was the Bridget Grannon to whom the trustees of the Wabash and Erie Canal executed their conveyance, the exclusive possession of William Grannon, under claim of title, had ripened into a perfect title long before the commencement of this suit, and, therefore, when he sold and conveyed to his co-appellant the appellee had no cause to complain. *Walker v. Hill*, 111 Ind. 223; *Wright v. Wright*, 97 Ind. 444; *Roots v. Beck*, 109 Ind. 472; *Law v. Smith*, 4 Ind. 56. And had the finding of the jury been within the issues there would have been a failure of proof.

There is no evidence tending to establish a fraud for which an action for damages could be maintained, but, if so, the action would be barred by the statute of limitations.

The relation of trustee and *cestui que trust* never did exist between the appellee and her uncle. If she ever held title to the real estate she lost it because of her own neglect and delay.

The judgment is reversed, with costs, and the court below is directed to grant a new trial, and proceed in accordance with this opinion.

Filed Feb. 19, 1889.

 Marshall *et al.* v. Lewark.

No. 13,430.

MARSHALL ET AL. v. LEWARK.

CONTRACT.—*Account Accruing Under.—Right to Sue Upon.*—A party is not bound to sue for the breach of a written contract, but he may sue upon an account accruing thereunder.

PRACTICE.—*Admission of Evidence.—New Trial.—Supreme Court.*—Where the admission or rejection of evidence is not made a cause for a new trial, no question in relation thereto is presented on appeal.

INSTRUCTIONS TO JURY.—*Supreme Court.—Practice.*—Where the instructions given are not all in the record, a judgment will not be reversed on account of those which are in the record, although inaccuracies appear therein, unless they are so palpably erroneous that no supposable instructions could cure them.

SAME.—*Joint Objection to.*—If two appellants jointly object to instructions given, the judgment will not be reversed if the instructions are only erroneous as to one.

From the Vigo Circuit Court.

T. N. Rice, J. T. Johnston, S. D. Puett and H. E. Hadley,
for appellants.

D. V. Burns and A. Seidensticker, for appellee.

MITCHELL, J.—Complaint by Lewark, in two paragraphs, against Theodore C. and Emmett F. Marshall. The first paragraph is a common count for money had and received, and for money laid out and expended by plaintiff for the defendants at their special instance and request.

The second paragraph is to recover money alleged to be due the plaintiff upon an account stated.

Upon issues duly formed the cause was tried by a jury, the trial resulting in a verdict and judgment for the plaintiff.

It appeared that the appellants, Theodore C. and Emmett F. Marshall, father and son, entered into a written contract with Lewark, in pursuance of which the former purchased large quantities of wool for the latter, who furnished the money and allowed the defendants a stipulated commission

117	377
130	473
117	377
133	314
117	377
135	673
117	377
142	167

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for their services. There was evidence tending to show that at the end of the wool season an accounting was had, and that a specified sum was found to be due the plaintiff, on account of moneys furnished by him remaining unexpended in the defendants' hands.

It was not necessary that the action should have been for a breach of the written contract in order to recover the money remaining in the defendants' hands. An action for money had and received, or upon an account stated, in case there was an accounting, was in proper form, and it did not result in a variance because it appeared from the evidence that the account accrued under a written contract.

In respect to the alleged error of the court in admitting in evidence the written contract, or the letter purporting to be the acceptance of the appellants' proposition to purchase wool for plaintiff, it is enough to say there is no merit in the objection; besides, neither the admission nor rejection of evidence of any kind was made a ground for a new trial. The point is, therefore, not properly presented.

Without stating the substance of the instructions objected to, or the nature of the legal propositions they involve, but referring us to the pages of the record where they may be found, the appellants indulge in some criticisms of a general character upon certain instructions given by the court at the plaintiff's request. *LaRose v. Logansport Nat'l Bank*, 102 Ind. 332; *Northwestern M. L. Ins. Co. v. Hazelett*, 105 Ind. 212.

Regardless of the general and imperfect manner in which objections to the giving and refusal of instructions by the court are presented, we have examined the instructions, and, in the absence from the record of those given by the court of its own motion, we can see nothing in those given, and now made the subject of complaint, when considered with other proper instructions, which we must presume were also given, that would justify a reversal of the judgment. The established rule is, that if all the instructions, taken together,

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express the law of the case correctly, there is no error. When, therefore, one or more instructions appear in the record, which, if properly explained and adapted to the case by other instructions, would or might be correct, we will presume that the necessary explanations or qualifications were made by the court, and unless the instructions given were so palpably erroneous as that no supposable instructions would have made them correct, a reversal will not follow, even if some inaccuracies appear in the instructions upon which error is predicated. *City of Indianapolis v. Murphy*, 91 Ind. 382.

For the same reason, we can not say that there was error in refusing to give instructions asked.

The appellants jointly objected and excepted to the instructions, and they jointly assigned the giving of them as a ground for a new trial.

It would hardly be claimed that they were erroneous as to both. This furnishes another reason why the judgment would not be reversed, even if the instructions were incorrect as to one of the appellants. We find no error.

The judgment is affirmed, with costs.

Filed Feb. 19, 1889.

Elliott v. Elliott *et al.*

117	380
161	540

No. 13,577.

ELLIOTT v. ELLIOTT ET AL.

WILL.—*Implied Trust.—Illegitimate Children.*—Where property is devised to a wife “to use and dispose of as she may think best for herself and my children,” she takes it charged with an implied trust for the use of herself and the testator’s children; and the word “children” will be held to mean the testator’s illegitimate children by the devisee, to the exclusion of his legitimate children by a former wife, when the circumstances show such to have been his intention.

From the Tippecanoe Circuit Court.

B. W. Langdon and *T. F. Gaylord*, for appellant.

W. D. Wallace, for appellees.

COFFEY, J.—In 1845 George Elliott was married in England, and had as the issue of said marriage one son, William. His wife died in 1847, and in 1848 he married Jane Haywood, and had by her one son, Robert G. Elliott, who is the plaintiff in this suit. In 1851 he abandoned his wife and children, and came to the United States and located at Lafayette, where, in 1852, he married Mary Ann Dungan, never having been divorced from his wife in Great Britain. By her he had four children, who, together with Mary A. Elliott, are the defendants in this suit. In 1865 George Elliott died in this State, leaving a will, which, omitting the formal parts, is as follows:

“I give and devise to my beloved wife, Mary Ann Elliott, my real estate in the county of Tippecanoe and State of Indiana, described as follows” (we omit the description), “together with all the appurtenances thereto belonging, in fee simple, that she may dispose of the same as she may think best for herself and my children.

“Item 2d. I devise and bequeath to my said wife all my money which I now have on hand, and all that may be on hand at the time of my decease, together with my household

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goods, for her to have and use as she may think best and proper for herself and my children; provided, that in case my beloved wife, Mary Ann Elliott, should marry after my decease, then, and in that case, it is my will that two-thirds of all my property, both real and personal, shall descend in equal proportion to my children.

"Item 3d. I hereby nominate and appoint my said wife, Mary Ann Elliott, executor of this, my last will and testament, hereby authorizing and empowering her to compromise and discharge, as she may think proper, all my debts and all the claims due to me, and I hereby revoke all former wills."

Both the wife in England and the son William are dead, having departed this life since the death of George Elliott. This suit is brought by Robert G. Elliott, the legitimate son by the second marriage, for the purpose of obtaining a construction of the will above set out, and to compel an accounting. The circuit court sustained a demurrer to the complaint, and the plaintiff excepted, and now prosecutes this appeal.

It is contended by the appellant that the will constitutes Mary Ann Elliott a trustee of the property thereby bequeathed to her, for the use of the children of the testator, and that the word "children," as used in the will, is to be construed as meaning legitimate children, and that as the children by Mary Ann Elliott are illegitimate, they have no interest in said property.

It is contended by the appellees that, by the terms of the will above set out, Mary Ann Elliott took the property bequeathed to her absolutely, and that no trust was created in favor of the children of George Elliott.

They further contend that if the will is to be construed as creating a trust in favor of the children of George Elliott, then it should be construed as creating a trust in favor of his children by Mary Ann Elliott only.

There is no allegation in the complaint to the effect that at the time George Elliott married Mary Ann Dungan, she then, or at any other time during his life, had any knowl-

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edge that he had a wife living. Neither is it alleged that she has again married since the death of George Elliott.

The first question for decision is, did the will create a trust in favor of the children of George Elliott?

It will be observed that by item 1st the real estate therein described is bequeathed to her *in fee simple*, that she might dispose of the same as she thought best for herself and the children of the testator.

The current of decisions of late years sets against the doctrine of converting the devisee or legatee into a trustee; and the courts now refuse to extend the doctrine, and will not imply a trust unless it appears from the will that such was the intention of the testator. *Lewin Trusts*, p. 137.

Consequently, where a devise is made to one standing in the relation of parent, with directions touching the *maintenance* of children, ordinarily no trust will arise, as such directions generally relate to the *motive* only of the testator or donor. So, when a bequest was made to one "to enable him to maintain the child," or to enable him "to maintain himself and family," or "towards the support and maintenance of her two children until they shall attain the age of twenty-one years," or "to A. for her own use and benefit, absolutely, having confidence in her sufficient and judicious provision for her children," or "being well assured that she will husband the means left to her for the sake of herself and children," or "to be applied by her in the bringing up and maintenance of her children." It is held in all such cases that the legatee takes an absolute estate and that no trust arises. *VanGorder v. Smith*, 99 Ind. 404; *Parsons v. Best*, 1 Thomp. & C. (N. Y.) 211; *Foose v. Whitmore*, 82 N. Y. 405; *Hunt v. Hunt*, 11 Nev. 442; *Williams v. Worthington*, 49 Md. 572.

But there is another class of cases, where trusts are sometimes implied from the words used, though an express trust is not declared, as where property is given to a parent or other person standing in the relation of parent, and some

direction or expressions are used in regard to the maintenance of his family or children. The question to be decided in this class of cases is, as in others, did the testator intend to create a trust and create an obligation, or did he merely state incidentally the motive which led to the gift? 1 Perry Trusts, section 117, says: "In the following cases a trust was clearly implied by the court: Where property was given, that 'he may dispose thereof for the benefit of himself and children,' or, 'for his own use and benefit, and the maintenance and education of his children,' 'for the maintenance of himself and family,' 'at the disposal of the legatee for herself and her children,' or 'all overplus towards her support and her family,' or 'to A. for the education and advancing in life of her children.'"

To the same effect is Lewin Trusts, p. 137. Lewin Trusts, p. 138, speaking of this class of trusts, says: "Where a trust is created, the person bound by it is the hand to administer it, and can sign a valid receipt for the fund, the subject of the trust. And the person bound by the trust is regarded in the same light as a committee of a lunatic or guardian of an infant, that is, he has a duty imposed upon him; but so long as he discharges that duty, he is entitled to the surplus for his own benefit, and the court requires from him no account retrospectively of the application of the fund, and allows him prospectively to propose any reasonable arrangement how the object of the trust may be accomplished, or will order payment to him on his undertaking to maintain the children properly, with liberty to the children to apply. Should the person bound by the trust become by misconduct unfit to maintain and educate the children, the court will not allow him to receive the fund; and should the fiduciary assign his interest, the court will inquire what part is needed for the maintenance and education of the children, and will give the surplus only to the assignee."

From these authorities we are of the opinion that the will

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of George Elliott, above set out, bequeaths to his widow, Mary Ann Elliott, the property of the deceased, charged with an implied trust for the use of herself and his children. Having reached this conclusion, it remains to be ascertained who is intended by the words "my children."

Here are two classes of persons to whom the words will apply, viz., two legitimate children in England, and four illegitimate children in this country. It may be conceded that when a man speaks of his children, he is ordinarily understood to mean his legitimate children. But where it is plain from the surrounding circumstances that he used the words in a different sense, they can not be given that meaning.

The fundamental rule in the construction of wills is, that the intention of the testator, if not inconsistent with some established rule of law, must control, and to ascertain that intention the courts will look to the circumstances under which he makes his will, as to the state of his property and his family. *Jackson v. Hoover*, 26 Ind. 511.

Fourteen years prior to his death George Elliott abandoned his wife and children in England and came to America, where he married another woman, by whom he had four children. In his will he bequeaths all his property, both real and personal, to the woman whom he married in America, in trust for the support of herself and his children, to be sold, and the proceeds expended as she might, in her judgment, deem best.

So far as appears from the record in this case she had no knowledge of the existence of the plaintiff in this case; indeed, the legal presumption is that she had no knowledge that George Elliott ever had another wife, for had she possessed such knowledge she would be chargeable with the crime of living in open and notorious adultery. No such charge is made. The plaintiff, at the time of the death of his father, was about fifteen years of age, while the defendants herein were small children. In the light of these surrounding circumstances can it reasonably be said that George

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Elliott, by his will, intended to provide for the plaintiff, and leave his children here unprovided for and unprotected?

The case of *Gelston v. Shields*, 78 N. Y. 275, is, in its facts, similar to this case. In that case Henry Shields, the testator, by his will, bequeathed certain of his property to his wife, Catharine, and bequeathed the remainder to his children, without naming them. After his death one Jane Shields, or Jane Valentine, appeared, and, claiming to be his widow, instituted suit for a dower interest in his estate, and succeeded. She had two children, who claimed to be the legitimate children of Henry Shields, deceased; but the court, construing the will in the light of the surrounding circumstances, held that the testator, in bequeathing his property to his children, must have intended to bequeath it to his children by Catharine Shields, who was designated in the will as his wife. Great stress was placed upon the fact that the will named Catharine Shields as the guardian of the minor children of the testator.

So, in this case, we think one strong circumstance in the case tending to show the intention of the testator, is the fact that George Elliott constituted Mary Ann Elliott the trustee of his property, to be expended by her for the support of his children.

In our opinion the words "my children," in the will in question, mean the children of George Elliott by his wife Mary Ann Elliott. Such being our conclusion, it follows that the appellant has no interest in the property in controversy, and that the circuit court did not err in sustaining the demurrer to the complaint.

Judgment affirmed.

Filed Feb. 19, 1889.

VOL. 117.—25

 Feder *et al.* v. Field *et al.*

No. 13,291.

FEDER ET AL. v. FIELD ET AL.

SUPREME COURT.—Dismissal of Appeal.—Effect as to Assignment of Cross-Errors.—The dismissal of an appeal by the appellant does not carry the case so far as it is affected by an assignment of cross-errors.

SAME.—Right to Assign Cross-Errors.—The code makes no provision for the assignment of cross-errors by the appellee, but the practice has been so long recognized that it has become one of the unwritten rules of procedure.

SAME.—Consideration of Cross-Errors.—While cross-errors may be assigned, the court is not bound to consider them in every instance; but where the entire record and all the parties are properly before the court, the appellee will be awarded affirmative relief if he is entitled to it.

SAME.—Notice.—In the absence of a rule requiring it, the appellee, upon assigning cross-errors, is not bound to give notice to appellants who are active parties, but notice may be necessary as to persons who do not join in the appeal, or who are in court merely upon notice from the appellant.

PLEADING.—Complaint.—Theory.—Judgment.—A complaint must proceed upon a definite theory, the cause must be tried on the theory constructed by the pleadings, and such a judgment as the theory selected warrants must be rendered, and no other or different one.

SAME.—Fraud.—Damages.—A complaint seeking a recovery against some of the defendants upon a money demand for goods sold and delivered, and auxiliary equitable relief against other defendants as fraudulent judgment plaintiffs and vendees, does not entitle the plaintiff to a judgment for damages against all the defendants.

From the Miami Circuit Court.

J. S. Frazer, J. S. Slick, W. D. Frazer and R. P. Effinger,
for appellants.

N. W. Bliss, M. L. Essick, G. W. Holman, K. G. Shryock,
H. J. Shirk, J. Mitchell, J. W. Rickel and M. R. Smith, for
appellees.

ELLIOTT, C. J.—The appellees assigned cross-errors and gave notice to the parties who did not join in the appeal. After the assignment of cross-errors was filed, the appellant

117	386
117	451
117	488
118	57
117	386
126	319
126	591
127	408
117	386
181	146
132	306
133	156
117	386
136	373
117	386
137	473
138	250
117	386
140	629
117	386
169	64
117	386
167	152
117	386
169	642

moved to dismiss the appeal, and obtained an order dismissing it. Very soon after this order was entered the appellees moved to reinstate the appeal upon their assignment of cross-errors, and their motion was sustained. The appellants now move to vacate the order reinstating the appeal of the appellees.

The contention of the appellants is, that the dismissal of the appeal by them carried the entire case, while the appellees contend that the appellants' dismissal did not carry the appeal so far as it is affected by the assignment of cross-errors.

It is true, as appellants' counsel contend, that our code makes no provision for the assignment of cross-errors by the appellee. But the practice has been so long and so often recognized as an appropriate one that it must be regarded as one of the unwritten rules of procedure. *Johnson v. Culver*, 116 Ind. 278; *Evansville, etc., R. R. Co. v. Mosier*, 114 Ind. 447; *Rochester v. Levering*, 104 Ind. 562 (575); *Thomas v. Simmons*, 103 Ind. 538; *Kammerling v. Armington*, 58 Ind. 384; *Jenkins v. Peckinpugh*, 40 Ind. 133; *Adler v. Sewell*, 29 Ind. 598; *Nutter v. Junction R. R. Co.*, 13 Ind. 479; *White v. Allen*, 9 Ind. 561.

A rule of this court, which has long been in force, recognizes the right to assign cross-errors. See Rule 14. The rule has so long and so steadily prevailed that it falls within the operation of the maxim that "The practice of the court is the law of the court." *Broom Legal Maxims*, 133.

The rule has much to commend it. Under its operation one appeal brings to the appellate court the entire controversy. By the one appeal as much can be accomplished as by two distinct appeals. If separate appeals were taken, then the only method of avoiding confusion would be to consolidate the cases, and this, while it would accomplish no more than a single appeal, would greatly increase the record and augment the costs. The rule is in harmony with the spirit of our code, since it tends to bring the merits of a contro-

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versy before the court in a short and simple method. It is consistent with the leading purpose everywhere manifested in our system of procedure, to bring all the parties concerned in a controversy, and all the questions growing out of a legal dispute, into court in one proceeding, so that by one judgment or decree the whole controversy may, if possible, be forever put at rest.

The rule which has so long prevailed, and which we here sanction and carry to its just and logical result, does no injustice to any party. It prevents a multiplicity of appeals, and yet presents for adjudication the rights of all the parties properly brought before the court. It enables the court to finally adjudicate upon the whole controversy. It prevents one party from taking an advantage of the other by appealing, and, after the assignment of cross-errors, dismissing the appeal and carrying the entire case out of court. It brings the practice on appeal into harmony with the practice in the trial courts, and gives uniformity and consistency to our system of procedure. It simplifies the practice, and yet preserves all rights.

In deciding that cross-errors may be assigned, we do not, by any means, decide that it is necessary to consider them in every instance. Nor do we decide that they are always, or, even generally, of controlling effect. If, for instance, all that the appellee asks is an affirmance of the judgment, then all that it is necessary to do, in a case where an affirmance can be reached by disposing of the errors assigned by the appellant, is simply to consider and decide the questions presented by the appellant's assignment. It is not every case where cross-errors will entitle the appellee to affirmative relief, for in many cases they can do no more than prevent a reversal or settle a question of costs. Where, however, the entire record, and all the parties, are properly before the court on appeal, and it is manifest from the record before the court that the appellee has not received the relief to which he was entitled, this court may direct that it be awarded him.

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In many cases the appellant may not bring such a record to this court as will present other questions than those arising on his assignment of errors, and in such a case the assignment of cross-errors would be unavailing. We do not mean to hold that the appellant is always bound to bring here a record that will benefit his adversary as well as himself; but there are many cases, and this is one of them, in which the whole record, with all the material questions, is necessarily brought before this court. With such a record before us, all questions should be decided, for, otherwise, the assignment of cross-errors would be an idle ceremony.

In many cases it may be necessary for the appellee to notify parties who do not join in the appeal in order to get them into court upon his assignment of cross-errors; but no notice is necessary, in the absence of a rule requiring it, where the parties are here as active appellants. Where one of several parties is actually in court as an actor, there is no necessity for giving him notice, unless some express rule requires it, for he is in court for all purposes legitimately connected with the cause. He is bound to take notice of the steps taken in the cause, unless, indeed, they are of an unusual character, or notice is made necessary by some rule of practice. A party in court, upon notice from the appellant, as a co-party, is, however, not always in court as to cross-errors, and to such a party it is necessary that notice be given; but if the party is before the court as one of the active participants in the controversy, he is not, in the absence of some rule, entitled to notice.

It is a general rule that if a court acquires jurisdiction for one purpose it will retain it for all purposes. *Field v. Holzman*, 93 Ind. 205; *Wood v. Ostram*, 29 Ind. 177.

We can conceive of no reason why this familiar rule should not apply to appellate proceedings. If a cause is in this court for the purpose of having an adjudication upon the questions presented by the appellant's assignment of errors, there is no reason why it should not be held to be here for

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the purpose of adjudicating upon the questions properly presented by the record and the appellee's assignment of cross-errors. Our code means that this court shall decide upon the substantial merits of a controversy where it can be properly done, and it can, we believe, be properly done where there is a sufficient record, a proper assignment of cross-errors and all the parties are before the court in due course of law.

The motion to vacate the order reinstating the appeal is overruled.

The appeal is in this court on the assignment of cross-errors. The contention now is that the appellees were not awarded all the relief against all the defendants to which the facts specially found entitled them. The appellees can not succeed unless the record affirmatively shows that they were entitled to judgment on the cause of action stated in the complaint. We say on the cause of action stated in the complaint, for the reason that no matter what other cause of action is shown, it will not avail. *Palmer v. Chicago, etc., R. R. Co.*, 112 Ind. 250.

It is not enough that facts are found in their favor, for it must also appear that their complaint entitled them to receive the relief they now demand.

Our judgment is that the facts stated in the special finding do not entitle the appellees to a judgment for damages against all of the defendants, and that the trial court awarded them all the relief they were entitled to receive under their complaint. A general outline of the complaint is given in the case of *Field v. Holzman*, 93 Ind. 205, and it is only necessary to add to what was there stated that the complaint does not proceed upon the theory that the plaintiffs were entitled to judgment for damages against all of the defendants, but that, as against the parties who conspired to secure the goods by fraudulent judgment, they were entitled to an injunction and to a decree setting aside the judgment and nullifying all claims asserted under it. The general frame and tenor of the com-

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plaint, as well as the specific prayer, show that the theory on which the pleading is constructed is that the plaintiffs, here the appellees, were entitled to the relief we have stated and not to recover damages from all of the defendants. The law is well settled that a complaint must proceed upon a definite theory, that the cause must be tried on the theory constructed by the pleadings, and such a judgment as the theory selected warrants must be rendered and no other or different one. *Manifold v. Jones*, ante, p. 212; *Moorman v. Wood*, ante, p. 144; *Lane v. Schlemmer*, 114 Ind. 296; *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544 (564); *Carver v. Carver*, 97 Ind. 497; *First Nat'l Bank v. Root*, 107 Ind. 224; *Mescall v. Tully*, 91 Ind. 86.

The theory now put forth by the appellees is radically different from that chosen for the trial, but their change of theory is made too late to be of service. It may be that a case could have been made entitling the appellees to a judgment for damages against each of the appellants, but no such case was made, for the complaint seeks a recovery against some of the defendants upon a money demand for goods sold and delivered, and auxiliary equitable relief against others of the defendants as fraudulent judgment plaintiffs and vendees. It does not, at all events, declare upon a cause of action founded on a tort of all the defendants remediable in damages. The case is, in principle, precisely the same as that of a creditor suing his debtor on a promissory note, and asking to set aside a fraudulent conveyance in order to subject the property fraudulently conveyed to sale to satisfy his judgment.

This was the construction given the complaint when the case was here the first time, and is substantially that for which appellees' counsel then contended. *Field v. Holzman*, supra.

Very different allegations than those now contained in the complaint would be required to bring this case within the rule declared in *Phelps v. Smith*, 116 Ind. 387, *Blair v. Smith*, 114 Ind. 114, and like cases.

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We do not controvert the general rule of law asserted by appellees' counsel, but we do affirm that the theory upon which they put the case to trial does not invoke the application of that rule.

The judgment is affirmed. It is adjudged that the appellants be taxed with all the costs in this court, except the cost of the transcript of the record, up to and including the motion to vacate the order reinstating the appeal, and that all other costs in this court, including the cost of the transcript of the record of the proceeding in the court below, be taxed against and recovered from the appellees who have assigned cross-errors.

Filed Feb. 20, 1889.

No. 12,672.

MARTZ v. PUTNAM.

REPLEVIN.—*Property in Hands of Assignee.*—*Jurisdiction.*—One against whom a proceeding in replevin is brought in the superior court of a county can not, while failing to deny the allegation of the plaintiff's ownership and his own unlawful detention, oust the jurisdiction of that court by asserting that he holds the property solely in the capacity of assignee under the voluntary assignment law, and must be sued in the circuit court.

SALE.—*Contract.*—*Personal Property.*—*Selection.*—*Delivery.*—*Vesting of Title.*—*Bailment.*—Where the contract for the sale of lumber, of a certain quality and designated dimensions, provides that the seller shall saw the same and pile it on sticks in his yard, subject to the order of the purchaser at any time, who is to pay for it when put on sticks, the seller agreeing to load it on cars when ordered by the purchaser, and in pursuance of the contract the timber is sawed, the lumber selected and put on sticks in the seller's yard, and paid for by the purchaser as invoices

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are rendered, the title thereby passes to the latter, and in subsequently loading the lumber upon the cars when ordered by the purchaser the seller acts as bailee, and not as owner.

SAME.—*Setting Apart Too Much.*—*Rights of Purchaser.*—*Voluntary Assignment.*

—*Title of Assignee.*—*Replevin.*—If, in making the selection of the lumber according to the contract, the vendor sets apart more than is called for by the agreement, and notifies the vendee that it is so set apart and subject to his order, there is a good delivery, and the title passes as to the quantity purchased, and the vendee has the right to take that much and refuse the balance; and if, before the property has been removed by the purchaser, but after it has been ordered shipped, the vendor makes an assignment of all his property for the benefit of creditors, the assignee acquires no title to such property, and the purchaser may maintain replevin.

SAME.—*Postponing of Title.*—*Insurance by Bailee.*—A stipulation in the contract that the seller should obtain insurance upon the lumber while in his yard, and be responsible for any loss which might occur prior to the delivery on the cars, does not postpone the vesting of the title, the seller, as bailee, having an insurable interest.

From the Marion Superior Court.

R. Hill and *R. N. Lamb*, for appellant.

V. Carter and *J. L. Mitchell*, for appellee.

OLDS, J.—This is an action of replevin brought by the appellee against William H. Martz, Thomas M., John W. and James C. Dickson, for the recovery of an amount of oak and poplar lumber described in the complaint, of various dimensions, amounting to nearly eighty-nine thousand feet.

Appellant, Martz, filed a separate answer in three paragraphs: *First.* A general denial. *Second.* Alleges ownership in himself; and the *third* alleges that "heretofore, in July, 1884, he was duly appointed assignee of the estate of William B. Dickson & Co., who were debtors, in embarrassed circumstances, and who made an assignment in said county and State, under and in accordance with the voluntary assignment laws of the State of Indiana; that this defendant thereafter accepted said trust and qualified and entered upon his duties as such, and as a part of the assets of said estate that came into his hands as such assignee, was the property sued

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for in this action, and he asserts no claim or right thereto except as such assignee. Therefore, he says this court has no jurisdiction to hear or to determine this action, but the same, so far as this defendant is concerned, must be heard and determined by the Marion Circuit Court."

Appellee filed a demurrer to the third paragraph, for want of sufficient facts to constitute a defence. The court sustained the demurrer, to which ruling of the court appellant reserved an exception, and assigns the said ruling as error.

This is the first question for consideration. This paragraph of answer alleges that he took possession of the property in question as part of the assets of the estate of Dickson & Co., but does not deny that the plaintiff was in fact the owner and entitled to the possession, and that the detention by him was wrongful, but it questions the jurisdiction of the court, on the ground that he holds the same as assignee, and as such assignee he can not be sued in the Marion Superior Court.

This position is not tenable. By not denying the fact, the paragraph admits property and the right to possession to be in the plaintiffs, and that he unlawfully detains the same. The unlawful detention is a wrong, and he could not set up that he did such unlawful act in his capacity as assignee, and avoid being sued in an individual capacity. If he detained the property unlawfully, an action of replevin would lie against him by the owner having the right to possession. Such owner was not required to ascertain in what capacity he claimed to own or to hold possession of the property.

If the property was the property of Dickson & Co., and Martz, as assignee, held and was entitled to the possession as such assignee, that would constitute a good defence to the action. In that case his possession would be lawful. *Rose v. Cash*, 58 Ind. 278; *Gilbert v. McCorkle*, 110 Ind. 215.

The main facts in the case are: The firm of Wm. B. Dickson & Co. entered into contracts for the sale of lumber to appellee on the dates and for amounts as follows: October 3d,

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1882, whitewood, 100,000 feet; November 5th, 1882, oak, 118,000 feet; February 23d, 1883, whitewood, 300,000 feet. The lumber was to be of a certain quality, and of various widths, lengths and thicknesses; to be sawed and piled on sticks in the Dicksons' lumber-yard, subject to appellee's order at any time, the Dicksons agreeing to load the same on cars when ordered by Putnam, Putnam to pay for the same when put on sticks. The second and third contracts provided that Dickson & Co. should insure the lumber from fire until delivered to the railroad, and in case of fire Putnam was not to be responsible for any loss.

There is no provision in the contracts as to the inspection of the lumber.

There was evidence tending to prove that the lumber was sawed by Dickson & Co., and piled on sticks in their yard; that invoices were sent to Putnam, stating the amounts and prices from time to time, and Putnam paid the amount called for in the invoices as they were rendered to him; that statements were made in the several invoices that the lumber was on sticks, subject to Putnam's order. From time to time Putnam ordered portions of the lumber shipped to Boston and other points, until there remained only about 89,000 feet unshipped.

There was also testimony to prove that, in May, 1884, the Dicksons pointed out to Putnam's agent the 89,000 feet, all piled in separate piles in the yard, and that said agent then ordered said Dicksons to immediately ship said several piles of lumber to Boston, and the Dicksons at the time promised to do so.

The lumber had all been paid for some months prior to May, 1884. Dickson & Co. failed to ship the lumber as requested and agreed, and on July 21st, 1884, made an assignment, for the benefit of creditors, to the appellant, Martz, and Martz took possession of all the lumber in said Dicksons' yard, including the several piles of lumber which had

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been sawed and piled on sticks in separate piles for Putnam under said contracts, amounting to 89,000 feet.

Appellee demanded possession of said lumber, which was refused, and he instituted this suit in replevin to recover possession of the same. Trial was had, and there was a verdict and judgment for the appellee. Appellant filed a motion for a new trial, which was overruled, and exceptions reserved.

It is contended by counsel for the appellant that the court erred in the instructions given to the jury on its own motion, and in refusing to give the instructions asked for by appellant.

Counsel, in their brief, do not urge any objection to the instructions given by the court, except to instructions numbered four and five, and all objections to the other instructions are waived by the failure to discuss them and point out the objections.

The fourth and fifth instructions are as follows :

"4th. Although you may not find from the evidence that the lumber in controversy was actually measured, yet if you find from the evidence that it or any part of it was sawed under the contracts between said plaintiff and said Dicksons and piled on sticks in said Dicksons' lumber-yard, separate and apart from other lumber of the same kind, as and for the lumber of said plaintiff, under said contracts, and that the said Dicksons sent said plaintiff an invoice or invoices of the same, and statements that the same was subject to his order, and that said plaintiff paid said Dicksons for the same upon or after the receipt of such invoice or invoices, and that this all took place before the date of the assignment of said Dicksons to said defendant Martz, that is, prior to the 21st day of July, 1884, then I instruct you that the title to the lumber in controversy, or of so much of it as was so sawed and piled on sticks in separate piles so as to be identified, invoiced and held subject to the order of the plaintiff, and paid for by him, did not pass by the said assignment to said defendant Martz, and the plaintiff is entitled to a verdict for all or

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any of such lumber or parcels of lumber as you may find from the evidence was so sawed, piled on sticks in separate piles, invoiced and held subject to the order of plaintiff in the lumber-yard of said Dicksons before the date of the said assignment; but if you find from the evidence that either one of the foregoing specified acts of sawing, piling on sticks in separate piles so as to be identified, invoicing to plaintiff, and holding to his order, and payment by plaintiff, was not consummated or performed before the date of this said assignment, before said 21st day of July, 1884, then your finding should be for the defendants.

“ 5th. If you find from the evidence that the lumber mentioned in the contracts was sawed and piled in the lumber-yard of the defendants Dicksons, and that the same was invoiced to plaintiff and paid for by him after the same was sawed, and you further find from the evidence that the parcels of lumber described in the complaint, or some of them had been by the said Dicksons before their said assignment, of date July 21st, 1884, piled on sticks in piles separate from other lumber in the lumber-yard of said Dicksons, as and for the lumber of said plaintiff, and subject to his order under the contracts between plaintiff and said Dicksons, before the date of the said assignment of said Dicksons to said Martz, and that, in the month of May, 1884, or at any other time before said Dicksons made their said assignment to said defendant Martz, the defendants Dicksons designated and pointed out to the plaintiff, or his agent, any of such piles of lumber in their said yard as the lumber of said plaintiff under said contracts; and if you further find that at the same time, or soon after and before said assignment, the plaintiff, or his agent, ordered the said Dicksons to ship the same piles of lumber so designated and pointed out, and that said Dicksons, or either one of them, then and there promised to ship the same to plaintiff, I then instruct you that such designation and pointing out, and the order of the plaintiff, or his agent, to ship the same, and the promise of said Dicksons

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to so do, was a sufficient setting apart and designating of such piles or parcels of lumber to pass the title to the plaintiff in such piles or parcels, and for such identical piles or parcels of lumber, if any, described in the complaint, you find from the evidence was so designated and pointed out, ordered and promised to be shipped, you should find for the plaintiff, and if you find there is or are any pile or piles or parcels of lumber not so designated and pointed out, ordered and promised to be shipped, described in the complaint, then as to such pile or piles or parcels of lumber, you should find for the defendants."

It is contended by counsel for the appellant, that, as the contracts specified the kind and quality of lumber, giving the dimensions, the length, thickness and width, if there was any portion of the lumber in the piles that did not conform to the specifications designated in the contracts, the purchaser, Putnam, would not be bound to receive such portion of the lumber or board or boards that did not conform to the specifications of the contracts, and that he could refuse to receive the same at any time before the same was loaded on the cars; that the Dicksons would have the right to retain and refuse to allow Putnam to take any lumber in the piles that differed in dimensions from the lumber described in the contracts, and hence there was no such separation of the lumber purchased from the general stock of lumber of the Dicksons, and no such designation of the particular lumber described and purchased by the contracts, as would pass title; that there yet remained something to be done, viz., measuring and inspecting the lumber before the title would pass to the purchaser.

It is further contended that it appears from the contracts that the title was not to pass until the lumber was loaded on the cars, for the reason that it is provided that the Dicksons were to insure the lumber against loss by fire, and if the lumber was destroyed by fire prior to being loaded on the cars that Putnam was not to suffer the loss, and that if the

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title passed when piled on sticks in separate piles and paid for, the Dicksons would have no insurable interest in the same; that the charge of the court is erroneous in stating that the title would pass to Putnam on the doing of the things stated in the charge prior to the delivery on board the cars.

The contracts in this case do not provide when nor by whom the lumber should be measured and inspected; there is an entire absence of anything in regard to inspection and measurement. They are contracts for so much lumber of certain kinds and dimensions.

The court, by the fourth instruction, charged the jury that, although the lumber was not actually measured, yet if the lumber was sawed under the contracts between appellee, Putnam, and the Dicksons, and piled on sticks in Dicksons' lumber-yard, separate and apart from other lumber of the same kind, as and for the lumber of Putnam, under said contracts, that the Dicksons sent Putnam an invoice of the same, stating that it was subject to his order, and that Putnam paid the Dicksons for the same upon or after the receipt of the invoice, before the date of the assignment of the Dicksons, the title did not pass to the assignee.

This instruction was based upon the theory that Dickson & Co. had contracted, and were bound by the contract, to furnish to Putnam a certain number of feet of lumber of a stated kind, quality and dimensions, to be sawed and piled in separate piles on sticks in the lumber-yard of the Dicksons, and when so piled and separated it was to be paid for by Putnam, and that when the Dicksons had, in good faith, sawed the lumber, separated it and piled it upon sticks, invoiced it and sent the invoice to Putnam, stating that the lumber was subject to his order, and he had paid for it, the title passed. That the Dicksons, after they had done all these acts under the contracts, and received the money of Putnam for the full value of the lumber, could not, and neither could their assignee, say that if there was a board, or any number of

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boards, in the piles which differed in dimensions from those which the contract called for, therefore there was no separation of the lumber sold from the Dicksons' other lumber, and the title did not pass to any of the lumber.

By the contract, Dickson & Co. sold to Putnam a certain quantity of lumber of certain designated dimensions. Dickson & Co. were to saw the lumber and separate it from their other lumber, and pile the same on sticks. By the terms of the contract Dickson & Co. were to elect what lumber was to be set apart from the main bulk of lumber owned by them in fulfilment of the contract.

Benjamin on Sales, section 359, says: "The rule on the subject of election is, that when, from the nature of an agreement, an election is to be made, the party who is by the agreement to do the first act, which, from its nature, can not be done till the election is determined, has authority to make the choice, in order that he may be able to do that first act, and when once he has done that act, the election has been irrevocably determined."

The first act to be done after the selection of the lumber and its separation from other lumber, was to pile it on sticks; that act Dickson & Co. were to perform, and by the contract they had the right to make the selection, and when once selected and piled, it was to be paid for by Putnam, and to be subject to his order.

When Dickson & Co. made the selection, and separated the lumber so selected from their other lumber, and piled it on sticks, sent an invoice to Putnam, and stated that it was subject to his order, and Putnam paid for it, the election was irrevocable, and the title passed to Putnam. Under the terms of these contracts it would constitute a severance of the property sold from the other lumber of Dickson & Co., and a delivery of the goods.

If, in making such selection, he selected more lumber than the contract called for, and piled it on sticks for the purchaser, and notified him that it was so piled, subject to his order,

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Putnam, the purchaser, would have the right to take only the amount purchased, and refuse the balance, but it would constitute a good delivery, and pass the title to so much as was purchased.

Benjamin on Sales, p. 293, says: "In case the whole mass is delivered to the vendee, with a right and power in him to make the separation, the title sufficiently passes to render him liable for the price, or enable him to sue any one for the wrongful conversion of the goods, even before he has separated them." *Crofoot v. Bennett*, 2 N. Y. 258.

In the delivery of the lumber upon the cars after such selection, notification and payment, Dickson & Co. only acted as bailees, and not as owners.

Story, in his work on Sales, section 298*a*, p. 317, stated the doctrine to be: "If payment is not to be made until delivery at some particular place, it might be fairly inferred that the contract was executory until such delivery, but where the sale appears to be absolute, the identity of the thing fixed, and the price for it paid, the title passes, and in carrying the property to some other place for the purchaser, the seller acts as bailee and not as owner." *Terry v. Wheeler*, 25 N. Y. 520.

The rule that if anything remains to be done the property does not pass, applies to anything that is required to be done prior to the delivery of the property. *Gibbs v. Benjamin*, 13 Am. Law Reg. 93. In this case the property was delivered by the piling on sticks, and from thenceforward it was held by the vendor subject to the order of the vendee. A sale may be complete so as to pass title, and yet something to be done by the parties, as weighing or counting the articles. *Riddle v. Varnum*, 20 Pick. 280. It is governed to some extent by the intention of the parties as expressed by their contract. *Whitcomb v. Whitney*, 24 Mich. 486.

In the fifth instruction to the jury the court said, in effect, that if the lumber mentioned in the contracts was sawed, piled on sticks in separate piles in the lumber-yard

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of the Dicksons, as and for the lumber of said Putnam, subject to his order, paid for and designated and pointed out by Dickson & Co. to Putnam, or his agent, and Putnam, or his agent, had instructed Dickson to ship the same, and Dickson & Co. had promised to ship the same, and this had occurred before the assignment of Dickson & Co., by these acts the title had passed to Putnam before the assignment.

If all these things had taken place, it would constitute a separation of the lumber from the remainder of Dicksons' lumber, and a delivery by Dickson & Co. to Putnam, and an acceptance by Putnam of the lumber, and the title to the same was in Putnam before the assignment of Dickson & Co.

It is further suggested and claimed that, as Dickson & Co. were to insure the lumber against loss by fire, and that, in case of loss by fire prior to the delivery on board the cars, they were to bear it, these facts should be taken as showing that the property did not pass to Putnam until the lumber was so delivered on the cars, and that the parties to the contract so understood it, as the vendors would have no insurable interest in the lumber if the title had passed to the vendee.

We think this clause in the contract negatives the theory of the counsel, and is in support of the interpretation placed by us upon the contract, that the title passed at the time of piling on sticks in separate piles. If the title did not pass, and it was understood by the parties to the contract that the title did not pass, until the lumber was delivered on board the cars, then if loss occurred before the delivery on cars and after piling on sticks, it would be the loss of Dickson & Co., and not the loss of Putnam, and there was no reason for such provision against loss by Putnam.

It is for the reason that the property was delivered by the piling on sticks in separate piles, and thereafter was the property of Putnam, the Dicksons simply holding the same subject to his order, that made any necessity for the provision in regard to insurance and for loss to be borne by

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Dickson & Co. during the interval between piling and shipping. It was a part of the consideration of the purchase that Dickson & Co. should insure the lumber and be responsible for loss by fire while it remained in their custody as bailees, and they had an insurable interest in the lumber. Schouler's Bailments and Carriers, 2d edition, sections 116 and 106. There was no error in the giving of instructions four and five by the court.

The charges asked for by the appellant stated general principles of law which were given to the jury by the charges of the court, given on its own motion, with the exception of the second charge, which is as follows: "Under the terms of the written contract between said plaintiff and said Dicksons, the title to the lumber described therein did not pass from the Dicksons to the plaintiff until everything that the Dicksons were to do in regard to said lumber, including its measurement and setting apart and loading on the cars for plaintiff in accordance with the terms of the contract, had been done." This instruction was properly refused for the reasons we have stated in considering the other charges. The title passed to Putnam when the lumber was separated, piled on sticks and paid for, and thereafter the Dicksons held it as bailees, subject to Putnam's order.

Counsel for appellant cite in support of their position the case of *Lester v. East*, 49 Ind. 588. That case differs materially from this. The contract provides specifically that the hogs shall be weighed at one place and delivered at another, at a certain time; to be hogs of a specified kind, part of the number then owned by the seller, and part to be received by him from another person. The hogs were never separated, weighed or delivered. Also, the *Commercial Nat'l Bank v. Gillette*, 90 Ind. 268. That was a sale of 510 car wheels, constituting a part of 1,100 wheels, and there had been no separation or delivery.

This case differs from all the cases cited by counsel for appellant. In this there was both a separation and a deliv-

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ery, while in the cases cited there was either no separation and delivery or no delivery.

The remaining question to be considered is whether the verdict is sustained by sufficient evidence, that being assigned as a cause for a new trial. This is argued upon the theory that the evidence did not show that there had been any delivery of the lumber, such as to pass the title to Putnam, before the assignment of Dickson & Co.

There is evidence tending to show the sawing, separation, piling on sticks in separate piles by Dickson & Co., as the lumber of Putnam under the contract, and invoicing and sending invoices to Putnam, including statements that the same was subject to his order, and full payment for the same by Putnam, and that the Dicksons pointed out the several separate piles of lumber to Putnam and his agent, and that they were instructed by the agent of Putnam to put the lumber on board the cars and ship the same, and agreed to do so; that all these acts took place before Dickson & Co. made an assignment. There was evidence to support the verdict.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed Feb. 20, 1889.

 Kehr et al. v. Hall.

No. 13,587.

KEHR ET AL. v. HALL.

RECEIVER.—*Property in Possession.*—*Conversion.*—*Right to Sue for.*—A receiver has such a special or qualified interest in property of which he obtains possession in pursuance of an order of court as entitles him to maintain an action for its wrongful taking and conversion.

SAME.—*Property not in Possession.*—A receiver can not maintain an action for the conversion of property of which he has never acquired possession, and as to which he does not show himself entitled to possession, beyond an averment that he was directed by the court to take such property into his possession, although he alleges that it has been wrongfully taken and converted by the defendant.

SPECIAL FINDING.—*Requirements of.*—Every fact necessary to the plaintiff's recovery must be found and stated in the special finding, or the judgment must be for the defendant.

SAME.—*Insufficient Complaint.*—Where the facts specially found relate to a paragraph of complaint which is bad, a judgment rendered thereon for the plaintiff will be reversed.

From the Elkhart Circuit Court.

H. D. Wilson, W. J. Davis and A. S. Zook, for appellants.

W. L. Stonex, E. E. Mummert, W. H. H. Dennis and S. J. North, for appellee.

BERKSHIRE, J.—The complaint in this case is in two paragraphs.

The first paragraph charges that the appellee, who was the plaintiff below, was appointed receiver by the Elkhart Circuit Court, to take into his possession and hold, subject to the order of said court, certain property described in a schedule attached thereto, marked exhibit A; that he took into his possession the said property, and, afterwards, the appellants, who were the defendants, with force and arms, wrongfully and forcibly took and carried away said property, and converted the same to their own use, it being of the value of \$400.

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The second paragraph alleges that the appellee was appointed receiver by the Elkhart Circuit Court, to take into his possession certain personal property described in a schedule filed therewith, and attached thereto, marked exhibit A; that the appellee qualified as such receiver, and afterwards demanded possession of the said property of the appellants, who had theretofore taken possession of the same; that the appellants refused to deliver the said property to the appellee, or any part of it, but wrongfully converted the same to their own use, it being of the value of \$400.

To each paragraph of complaint the appellants demurred. The demurrer is very awkwardly and carelessly drawn.

The second cause of demurrer assigned is: "The defendants further demur to each paragraph of plaintiff's complaint, separately, for the reason that said paragraphs do not state facts sufficient to constitute a cause of action against the defendants."

This was intended, no doubt, as a separate demurrer to each paragraph, and we are inclined to so construe it; but we would be much better pleased with it if it were more artistic in form.

The court overruled the demurrer to both paragraphs of the complaint, and the proper exceptions were saved.

After some other proceedings were had, which we need not notice, the appellants pleaded the general denial, and with it an agreement was filed that all matters of defence might be proved without further pleading.

The case was tried by the court and a special finding made.

The facts and conclusions of law are substantially as follows: That on the 5th day of April, 1883, Ann Smith brought suit in the Elkhart Circuit Court for support against David Smith, her husband, to which action she made one Olander Rankin a defendant, alleging in her complaint that he was indebted to her husband upon notes secured by a chattel mortgage hereinafter referred to, and she asked as relief that the amount of said indebtedness be applied in

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payment of any judgment she might recover; that Rankin was duly served with process and was properly defaulted; that the husband, David Smith, was duly served with process and appeared to said action; that on the 15th day of May, 1883, the appellee, upon the application of the plaintiff in said action, was appointed receiver, and on the 5th day of June duly qualified as such; that afterwards such proceedings were had that the plaintiff in said cause recovered a judgment against her said husband for three hundred dollars and costs, and that Rankin was indebted to him in the sum of \$391, secured by a chattel mortgage recorded in Elkhart county, and that he pay the amount of plaintiff's judgment and costs to the receiver, and the receiver was ordered to institute suits and take any action necessary for the collection of the debt and the foreclosure of the mortgage, and out of the proceeds to pay the plaintiff's judgment; that there is now due on said judgment the sum of \$342.50 and \$30.65 costs; that on the 5th day of April, 1883, said David Smith commenced an action before a justice of the peace against Rankin to recover the amount due on the first of the series of notes mentioned in said chattel mortgage; that Rankin appeared to said action and thereafter such proceedings were had, that on the 17th day of May, 1883, Smith obtained a judgment against Rankin for the sum of \$160 and costs, and on the 21st day of May, 1883, an execution was issued on said judgment, and was delivered to the appellant Kehr, who was a constable of the township wherein said judgment was rendered, who, at six o'clock in the morning of the 28th day of said month, served the same on the property named in said mortgage, and then in the possession of said Rankin, and sold said goods by virtue of said execution on the 8th day of June, 1883; that the notice and other proceedings, down to and including the sale, were in form regular; that the appellant Zook, who was the attorney for said Smith, the judgment creditor, was the purchaser at said sale for the said Smith; that after satisfying the execution there

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was in the hands of the appellant Kehr, as constable, \$37.31, which was paid over to the appellant Zook as such attorney, and the amount was credited on another of the series of notes held by said Smith against said Rankin; that the appellant Zook disposed of the said property so purchased by him at said sale to third persons; that the said property sold by the said constable was at the time of the value of \$500; that the said Smith was a non-resident, and had no property in the State of Indiana subject to execution; that no part of the judgment obtained by the said Ann Smith has ever been paid; that said mortgage was executed by Rankin to Smith to secure the sum of \$375 on the 21st day of November, 1882; that at the time it was executed and recorded Rankin, the mortgagor, was a resident of Kosciusko county, Indiana, and had no property, other than said mortgaged property, subject to execution; that the appellee was entitled to recover of the defendants a sum sufficient to pay the said judgment of Ann Smith against David Smith, not exceeding the amount due and owing from said Rankin to said David Smith aforesaid.

To the conclusions of law there was the proper exception, and a judgment was rendered for the appellee.

There are two errors assigned by the appellants:

1. The court erred in overruling the demurrer to the several paragraphs of the complaint.
2. The court erred in its conclusions of law.

We discover no valid objection to the complaint. If the appellee was in possession of the property in question as receiver, pursuant to the order of the Elkhart Circuit Court, and the appellants wrongfully wrested the possession from him, and converted the property to their own use, we are of the opinion that the appellee had a special or qualified interest in the property such as entitled him to maintain the action. Story Bailments, sections 93, 94, 150, 152, 352; 2 Blackst. Comm. 452; *Waterman v. Robinson*, 5 Mass. 303 (304); *Grove v. Wise*, 39 Mich. 161; *Harvey v. McAdams*, 32 Mich.

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472; *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236; *Easter v. Fleming*, 78 Ind. 116.

The second paragraph of the complaint is, in our opinion, bad. It is alleged that the appellee was directed by the Elkhart Circuit Court to take possession of the property in the chattel mortgage described, and that he demanded possession thereof of the appellants, and they refused to surrender the possession, but converted the property to their own use wrongfully. It is not alleged that the appellee ever had possession of the property, but the inference to be drawn from what is alleged is that he never had the possession thereof.

From all that appears in this paragraph of the complaint, it does not appear that the appellee was entitled to the possession of the property. The direction given to the appellee by the Elkhart Circuit Court, and the wrongful conversion by the appellants, do not of themselves give to the appellee a right of action. *Picquet v. McKay*, 2 Blackf. 465; *Easter v. Fleming*, *supra*.

The complaint is for the conversion of certain property, a schedule of which is filed therewith.

It is not averred in the complaint that the property, as given in the schedule, was the same property described in a chattel mortgage executed by Olander Rankin to David Smith.

The property described in the special finding is found to be certain property mortgaged by Rankin to Smith, but it is nowhere stated or found that it is the same property alleged in the complaint to have been converted.

We can not infer that the mortgaged property to which the special finding refers is the property contained in the schedule filed with the complaint; therefore, if the complaint was good (both paragraphs) the judgment would have to be reversed for this reason.

Every fact must be found and stated in the special finding necessary to the plaintiff's recovery, or the judgment must be for the defendant. *Meeker v. Shanks*, 112 Ind. 207; *Stix v.*

Sadler, 109 Ind. 254; *Kurtz v. Carr*, 105 Ind. 574; *Mitchell v. Colglazier*, 106 Ind. 464; *Cincinnati, etc., R. W. Co. v. Gaines*, 104 Ind. 526.

But if there was no infirmity in the special finding the judgment would have to be reversed, for the reason that the facts as found relate to the second paragraph of the complaint, which is bad, and not to the first paragraph, which is good.

There is a cross-error assigned by the appellee, but as it relates to the overruling of a motion to modify the judgment no good purpose can be served by considering it.

The judgment is reversed, with costs, with direction to the court below to sustain the demurrer to the second paragraph of the complaint.

Filed Feb. 20, 1889.

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No. 13,396.

THE BOARD OF COMMISSIONERS OF PULASKI COUNTY v.
SENN.

TAXES.—Wrongful Assessment.—Increase of Valuation by Auditor.—Refunding.

—A county auditor has no power to increase the valuation of lands for purposes of taxation as fixed by the assessor and the county board of equalization, and his action in doing so constitutes such a wrongful assessment, within the meaning of section 5813, R. S. 1881, as entitles a taxpayer to have the excess of taxes paid by him thereunder refunded.

SAME.—Valuation by Assessor and Board of Equalization Conclusive.—The valuation placed upon lands by the assessor and the board of equalization, even if too small, is conclusive upon the auditor and all other persons, until changed in some manner expressly authorized by law.

From the Pulaski Circuit Court.

The Board of Commissioners of Pulaski County v. Senn.

J. C. Nye and R. A. Nye, for appellant.

N. L. Agnew and B. Borders, for appellee.

MITCHELL, J.—Senn presented a statement in the nature of a complaint to the board of commissioners of Pulaski county, in which he showed that, in the year 1880, he was the owner of certain real estate in Indian Creek township, Pulaski county, which the township assessor duly appraised and returned for purposes of taxation, as required by law. It is averred that, after the return of the appraisement so made, the county board of equalization, convened for the year 1880, added fifteen per cent. to the valuation of all the lands in that township, as made and returned by the assessor, and that the valuation so made, with the per cent. added, constituted the basis for the taxation of lands in Indian Creek township for the years 1880 to 1885 inclusive.

It is alleged that, after the action and adjournment of the board of equalization, the county auditor, wholly without authority, wrongfully and illegally increased the valuation and appraisement of all the lands in Indian Creek township, including those owned by the petitioner, and that he placed the increased valuation and assessment, so wrongfully made, upon the tax duplicate, and caused the county treasurer to collect taxes from the petitioner, on his land, on the basis of the assessment so wrongfully made by the auditor, for every year, except one, from 1880 to 1885 inclusive. The petitioner avers that he had paid all the taxes chargeable against his property according to the assessment lawfully made and equalized, and he appended a table or list showing the amount paid to each fund on account of the alleged wrongful assessment made by the auditor. He also averred that the assessment made by the auditor had been duly adjudged and declared, in a proper proceeding theretofore instituted in the Pulaski Circuit Court, illegal and wrongful. He asked that the amount paid by him in excess of that required by the assessment made by the township assessor, and

The Board of Commissioners of Pulaski County v. Senn.

fixed by the board of equalization, be refunded to him. He had judgment in the circuit court according to the prayer of his petition.

It is contended that the claim thus presented does not state facts sufficient to entitle the petitioner to any relief, and that the court erred in overruling the demurrer which was filed in the circuit court after the cause had been taken there by appeal from the order of the board refusing to allow the claim.

The claim was presented under the provisions of section 5813, R. S. 1881, which make it the duty of the board of commissioners of any county in this State, when any person or corporation shall appear and establish by proper proof that he or it has paid any amount of taxes which were wrongfully assessed, to refund the same out of the county treasury, so far as they were assessed and paid for county taxes.

The succeeding section prescribes the duty of the board, and other officers, in case the taxes so paid have been paid into the State treasury.

Accepting as true the elementary proposition, that one who relies upon a statute for a right of action must make a case distinctly within its terms, we are nevertheless of the opinion that the facts set out in the petition make a case which falls clearly within the terms of the statute.

There is no claim that the auditor had any color of authority to add to the valuation put upon the real estate in Indian Creek township by the assessor and board of equalization. His unauthorized interference with the assessment, as lawfully made, after the board of equalization had adjourned, was, therefore, not only unlawful and irregular, but it was wrongful within the meaning of the statute, as it has been construed by the decisions of this court. *Board, etc., v. Armstrong*, 91 Ind. 528; *Durham v. Board, etc.*, 95 Ind. 182; *Board, etc., v. Murphy*, 100 Ind. 570.

When the assessor, and after him the board of equalization, had adjusted the fair cash valuation of the lands, the

The Board of Commissioners of Pulaski County v. Senn.

judgment thus arrived at was conclusive upon the county auditor, and all others, and could only be changed by some proceeding expressly authorized and prescribed by law.

In cases like the present, the board of equalization has authority to act, and its action is binding within the ruling in *Kuntz v. Sumption*, ante, p. 1.

In the absence of any authority vested in the auditor to raise the valuation, it became his duty to carry the amounts thus assessed against each tract of land on to the tax duplicate, without alteration or change. The case falls within the principles which ruled *Newsom v. Board*, etc., 92 Ind. 229; see, also, *City of Indianapolis v. Vajen*, 111 Ind. 240, and cases cited.

At the trial the appellant offered evidence tending to show that the valuation placed upon the land by the auditor, and upon the basis of which the petitioner paid his taxes, was less than the actual cash value of the land. This evidence was correctly excluded by the court. It is true the statute required the land to be assessed at its real value, but it is also true that it appointed certain officers upon whom was devolved the duty of ascertaining, fixing and equalizing the value. The valuation as fixed by the officers designated for that purpose, acting under the sanction of their official oaths, must be regarded as conclusive, until it is changed by a method prescribed by law. *Wattles v. City of Lapeer*, 40 Mich. 624, is not opposed to the conclusion above stated.

That the court admitted in evidence the complaint, together with the record of the proceedings and judgment of the Pulaski Circuit Court, in a case instituted by another resident taxpayer of Indian Creek township, challenging the legality of the same assessment made by the auditor, did not constitute error of which the appellant can complain. The material facts were all admitted of record, and a correct result was reached on the facts thus admitted.

The judgment is therefore affirmed, with costs.

Filed Feb. 20, 1889.

No. 13,593.

WAINWRIGHT v. SMITH ET AL.

GUARDIAN AND WARD.—*Final Settlement.—Setting Aside.—Fraud.*—Where a guardian, confederating with another, presents to the court a false statement and obtains an order for the payment to the confederate of a claim not properly chargeable against the estate of his ward, there is such fraud as authorizes the setting aside of his final settlement.

From the Hamilton Circuit Court.

T. J. Kane and *T. P. Davis*, for appellant.

W. Booth and *C. D. Potter*, for appellees.

BERKSHIRE, J.—This action was brought to set aside the final settlement and the approval of the final settlement report which the appellant made as the guardian of the appellees.

The errors assigned are, in substance, as follows:

1. The court erred in overruling the demurrer to the complaint.
2. The court erred in its conclusions of law.
3. The court erred in overruling the motion for a new trial.

The complaint charges that, on the 28th day of April, 1882, the appellant was duly appointed guardian of the appellees; that as such guardian he received property belonging to the wards jointly to the value of \$127; that, at the September term, 1883, of the Hamilton Circuit Court, the appellant, as guardian, and for the purpose of defrauding his said wards, went to one George Shirts and confederated and conspired with him; that the two prepared an application to said court, which was verified by the appellant, in which they asked an order of the court directing the appellant to pay rent to said Shirts, out of the trust funds in the hands of the appellant belonging to his said wards, for property which the father of the appellees occupied as tenant; and as a reason therefor it

Wainwright v. Smith et al.

was stated in said application that the said wards were without homes, and without anyone to support them, and that if said rent was not paid the said wards would have to go to the poor-house to live, and be supported by the county; that said application was acted upon by the court, and the order granted directing said guardian to pay rent to said Shirts; that the facts so stated in said application were false; that the said appellees had homes of their own, made their own living, and supported themselves; that their father was amply able to support them and pay his own rent; that, after obtaining said order, the said guardian paid said Shirts \$72 for rent; that the appellant knew, when he made the application and obtained said order, that the statements which said application set forth were untrue, and that what was done was for the purpose of defrauding the appellees.

We are of the opinion that the complaint is good, and that the demurrer was rightfully overruled.

If the facts charged are true (and they are admitted by the demurrer), the appellant presented an application to the court which he knew to be false, and thereby obtained an order of the court through which the appellees were wrongfully deprived of over one-half of their estate.

Does the special finding of facts support the complaint? It is not stated in the special finding in so many words that the appellant and Shirts confederated and conspired together to defraud the appellees, nor is it necessary that such a statement should appear in the special finding.

If the appellant and Shirts came together and drew up an application which they knew was not true, and the appellant swore to it and presented it to the court, and thereby obtained an order directing him to pay money to Shirts which he (the appellant) had in his hands as the guardian of the appellees, and, acting upon the order thus obtained, he made payments to the amount of \$72, a fraud was practiced not only as to the appellees, but upon the court, to the injury of the appellees.

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The foregoing are, in substance, the facts as they appear in the special finding, and they support the substantial allegations contained in the complaint.

We are of the opinion that the court did not err in its conclusions of law.

We have examined the evidence as it appears in the record, and are not prepared to say that there is no evidence tending to sustain the special finding of the court.

The judgment is affirmed, with costs.

Filed Feb. 22, 1889.

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No. 13,015.

THE QUEEN INSURANCE COMPANY v. THE STUDEBAKER
BROS. MANUFACTURING COMPANY.

SUPREME COURT.—*Assignment of Error.*—*Causes for New Trial.*—*Practice.*—Matters which are properly causes for a new trial, and which should be embraced in a motion therefor, can not be independently assigned as errors in the Supreme Court.

SAME.—*Form of Judgment.*—An objection to the form of a judgment can not be made for the first time in the Supreme Court.

SAME.—*Weight of Evidence.*—A judgment will not be reversed on the mere weight of the evidence.

NEW TRIAL.—*Admission and Exclusion of Evidence.*—*Practice.*—A cause for a new trial on account of the admission or exclusion of evidence, must specify the particular rulings complained of.

SAME.—*Assessment of Damages.*—*Waiver.*—A question as to the amount of damages assessed is waived if not assigned as cause for a new trial.

From the St. Joseph Circuit Court.

T. Bates and A. L. Brick, for appellant.

A. Anderson and L. Hubbard, for appellee.

The Queen Insurance Co. v. The Studebaker Bros. Manufacturing Co.

OLDS, J.—This is an action on an insurance policy issued by the Queen Insurance Company, appellant, to the Studebaker Bros. Manufacturing Co., appellee, on the 17th day of December, 1884, whereby it insured appellee against loss or damage by fire on a certain lumber-yard to the amount of \$2,000. There was other insurance on the lumber amounting to some \$50,000.

On the 29th day of May, 1885, a large portion of the lumber was destroyed by fire. Appellee gave notice and made proof of the loss. Appellant failed to pay, and this suit was brought to recover the amount due upon the policy.

The complaint was in the usual form, and the appellant answered in three paragraphs: First, general denial. The second admits the policy of insurance and alleges that it is subject to the restrictions set forth in said policy, that "this policy shall be and become void in case the assured shall have made any false or fraudulent representations," and charging that the appellee was guilty of fraud, within the meaning and intent of said clause, by making false and fraudulent entries in its books of account, by which appellee's loss, as shown by said statements and books, was much greater than the actual loss sustained; that when appellant applied to appellee for a true and exact statement of its loss and damage, appellee produced and exhibited to appellant the books containing said false and fraudulent entries, and claimed and declared to appellant that the books and accounts showed an exact and truthful account and statement of appellee's loss by said fire; that appellee well knew said statements were fraudulent, and was, therefore, guilty of fraud within the true intent and meaning of the condition in the policy which provided that any fraudulent representation vitiated the policy. The third paragraph sets up and alleges that after the fire the appellee presented to appellant its proof of loss; that for the purpose of inducing appellant to pay appellee more than the actual loss sustained, it stated in the proofs that

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the amount of its loss was \$46,733.66, and that defendant's proportion of said loss amounted to \$1,779.49; that appellee's loss did not amount to that sum, and that the prices fixed upon the lumber alleged to be destroyed were false and fraudulent.

Appellee filed reply to the answer. The cause was submitted to the court for trial, and there was a finding and judgment for the appellees in the sum of \$1,660.

The appellant filed a motion for a new trial for the following reasons, as stated in the motion:

First. The court admitted on the trial improper evidence on the part of the plaintiff.

Second. The court refused to admit proper evidence offered by the defendant.

Third. On the trial the court improperly ruled upon the question of plaintiff's fraud before the defendant's evidence on that question had been concluded or fully heard.

Fourth. The verdict is contrary to the law and the evidence in the case.

There are ten errors assigned: First, error in overruling the motion for a new trial; second, error in admitting improper evidence; third, error in refusing to admit proper evidence; fourth, error of the court in ruling upon the question of appellee's fraud before appellant had concluded its evidence on that question; fifth, error in that the court's finding was contrary to law; sixth, error in deciding the case contrary to the evidence; seventh, error in the finding of the court on the question of fraud; eighth, error in refusing to admit certain evidence; ninth, error in entering judgment against appellant; tenth, error in the order requiring the payment of money by appellant to the appellee.

The first assignment of error is proper; the others are not, and present no question in this court. *Bolin v. Simmons*, 81 Ind. 92; *Wilson v. Root*, 43 Ind. 486; *Bellefontaine, etc., R. W. Co. v. Reed*, 33 Ind. 476; *Tyner v. Adams*, 34 Ind. 401;

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Louisville, etc., R. W. Co. v. Head, 80 Ind. 117; *Bake v. Smiley*, 84 Ind. 212; *Hutts v. Shoaf*, 88 Ind. 395.

Objection to the form of a judgment can not be made for the first time in this court. It must be properly presented to the court below, and a ruling of that court taken and exceptions properly reserved and presented to this court. *Stephenson v. Ballard*, 82 Ind. 87; *Benefiel v. Aughe*, 93 Ind. 401; *Terry v. Shively*, 93 Ind. 413; *Becknell v. Becknell*, 110 Ind. 42; *Stout v. Curry*, 110 Ind. 514.

The first and second reasons stated in the motion for a new trial are too indefinite to present any question.

In the case of *Elliott v. Russell*, 92 Ind. 526, this court says: "It has been many times ruled by this court, that a cause for a new trial on account of the admission or exclusion of evidence must be so definite that the opposite counsel, the court below, and this court may know of the evidence admitted or excluded, without searching through the record, and conjecturing as to what is complained of." And numerous authorities are cited in support of this rule. See, also, *Louisville, etc., R. R. Co. v. Wunderlich*, 81 Ind. 105.

The third cause stated in the motion for a new trial is in the nature of a complaint against the judge trying the case for stating his views in regard to the purpose and effect of certain testimony being introduced upon the trial. No objection was made or exceptions taken at the time, and no question is presented for this court to pass upon. We have looked into the record and read the statement made by the judge, of which counsel so seriously complain, and find that while appellant's witness was upon the witness-stand, and being examined by counsel for appellant, an objection was made to a question propounded to the witness. The court overruled the objection, and, upon doing so, made a statement as to the theory of the admissibility and effect of the evidence. The court used no improper language, nor pre-judged the case, nor criticised either parties or witnesses, but, in a general way, stated the views of the court as to the competency, pur-

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pose and effect of the evidence. When this was done the examination of the witness proceeded, and other witnesses were examined. There was nothing improper in the conduct of the court trying the cause.

Waiving the informality of the fourth cause assigned for a new trial, it presents the question of the sufficiency of the evidence to sustain the finding and decision of the court.

It has been so often decided that this court will not weigh the evidence, and will not reverse a case on the mere weight of the evidence, that it is unnecessary to cite authority in support of this statement of the law.

We have carefully examined the evidence, and it fairly supports the findings and decision of the court.

Counsel for appellant claim, and have argued at length, that the damages assessed are too large. This was not assigned as a cause for a new trial, and is waived. *Millikan v. Patterson*, 91 Ind. 515; *Floyd v. Maddux*, 68 Ind. 124.

There is no error for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed Feb. 22, 1889.

No. 14,045.

BROWNLEE ET AL. v. LOWE ET AL.

CONTRACT.—*Consideration.*—*Railroad.*—*Agreement of Third Persons to Pay Contractors.*—Where, by the terms of the agreement between the contractors for the construction of a railroad and the railroad company, the former are not to proceed with the work until after the company has secured the means necessary to pay therefor, a subsequent contract of third persons, reciting the fact of a deficit in the funds of the company

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to a certain amount and their desire for the speedy completion of the road, and engaging to pay to the contractors the deficit, upon certain conditions, if so much remained when the work was completed, is enforceable by the contractors after the work is done and the conditions performed, it being then too late to question the consideration for the agreement; besides, the consideration is sufficient.

SAME.—Several Liability of Obligors.—Satisfaction of Debt.—Where the deficit is twenty-five thousand dollars and the signers of the contract severally agree to pay the maximum sum of two hundred and fifty dollars, that amount may be collected from individual obligors until the whole debt is satisfied, although the proportion of the obligors as between themselves is less than the stipulated liability of each.

From the Blackford Circuit Court.

G. W. Harvey, A. E. Steele, C. E. Shipley and W. A. Bonham, for appellants.

C. Cowgill, H. B. Shively and C. E. Cowgill, for appellees.

MITCHELL, J.—Henry R. Lowe & Co. instituted separate actions against the appellants, twenty-three in number, in the court below, to recover the amount alleged to be due the plaintiffs upon a written contract which was signed by one hundred and sixty-four persons, among whom were the appellants. The actions were afterwards consolidated.

It appears that Lowe & Co. had entered into a written contract with the Frankfort, St. Louis and Toledo Railroad Company, whereby they had agreed to construct and equip a certain portion of its line of road. They were not, however, to commence work until ten days after the railroad company had procured the right of way, and until it had provided, or become possessed of, the means to pay the contractors a certain amount in stock and mortgage bonds, and in addition thereto the sum of \$4,000 per mile in cash, or cash assets.

The railroad company was deficient in funds to make the cash payment, and the contractors refused to proceed with the work until the funds were assured. Thereupon the defendants executed the contract sued on, which recites the making of the contract between the railroad company and the contractors, and that there was a deficit of the sum of \$25,000

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in the amount necessary to pay the contractors for constructing so much of the road as was embraced by the terms of their contract.

In consideration of the premises, and of their desire for the speedy completion of the railroad, the persons signing the contract agreed to pay Lowe & Co. \$25,000, subject to two conditions: The first condition was, that the railroad company fail to pay the amount, in which event each of those whose name appeared on the paper sued on agreed to pay \$250, which sum was to be in full payment of the respective shares of each. The second condition was, that one-half the amount was to be paid when a train of cars should be run over the railroad between certain points, and the other half when a train of cars should be run between certain other points. It was further stipulated that in case liability was incurred by the signers of the contract, each was to pay only his proportion of the sum stipulated to be paid, and that in no case should the share of anyone be more than \$250.

The complaint contains the necessary averments showing that the conditions upon which the defendants' liability was to attach had all been performed, or had happened. Several judgments were rendered in the court below against all of the defendants, each judgment being for \$341.75.

It is now claimed that upon the facts stated in the complaint the contract signed by the appellants was executed without any consideration. This position is not maintainable.

It is said that the contract of appellants to pay Lowe & Co. \$25,000 was nothing more than an agreement to pay them for doing that which they were by their contract, previously entered into with the railroad company, already bound to do.

It is undoubtedly true, that a promise without any new consideration of some sort to pay one if he will do that which he is already bound by contract to do, without the promise sued on, is without consideration, and, therefore, void. *La-*

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boyteaux v. Swigart, 103 Ind. 596; *Ritenour v. Mathews*, 42 Ind. 7.

It is likewise well settled, that the mere naked promise to pay the already existing debt of another, without a new consideration, is void. *Starr v. Earle*, 43 Ind 478.

So, where a note has already been executed by the principal, another who subsequently signs it as surety, without a new and distinct consideration, is not bound. *Favorite v. Stidham*, 84 Ind. 423.

None of the cases upon which the appellants rely are, however, applicable to the present case. The consideration which supports the agreement sued on is obvious; it is recited upon the face of the contract that there was a deficit to pay the contractors, which those who signed the contract agreed to pay upon the conditions mentioned. Lowe & Co. were not bound to proceed with the execution of their contract, which required a large outlay of money on their part, until ten days after the railroad company had obtained funds sufficient to assure them of their pay. The contractors were refusing to proceed, as was their right under the contract, because of the deficit.

The appellants then came forward with the agreement, in which they promised to pay to Lowe & Co. the deficiency upon the conditions already mentioned, whereupon the contractors proceeded to construct, equip and put the road in operation according to their agreement. The contractors reserved in their contract with the railroad company the right to withhold the performance of any work until the funds were secured with which to pay them. This was ample security against ultimate loss, because they could not be required to commence work until the company had secured the necessary amount of funds. The contractors were induced to forego this prudential feature of their contract, and to commence the work, in consideration of the direct personal engagement of the appellants to pay the deficit, to the amount of \$25,000, if so much should remain when the work was

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completed. It is now too late, after the work has been done and the deficit remains, to say there was no consideration for the agreement. The first paragraph of the complaint does not state the facts as fully as the second and third, but it is nevertheless sufficient to withstand a demurrer. *Singer Mfg. Co. v. Forsyth*, 108 Ind. 334.

It is contended lastly, that, because of the stipulation in the contract that each of the obligors was to pay only his proportion of the sum stipulated to be paid, the amount of the recovery was too large.

The proportion of each, it is contended, was the one hundred and sixty-fourth part of the whole sum, equal to \$152.44, which, with interest, making a total of \$203.51, should have been the amount of recovery, if the appellants were liable at all.

It seems clear to us, from a consideration of the whole contract, that the parties themselves stipulated what should constitute the share or proportion of each. The maximum amount for which all those who signed were to be liable was \$25,000, and the maximum liability of each was \$250.

The liability was several. Each one may be held liable for the amount of \$250, until the sum of \$25,000 is collected or until the whole debt is satisfied. So long as the unsatisfied amount exceeds the sum for which each obligor agreed to be held, the plaintiff may pursue him, and others bound upon the same instrument, and recover judgments against each to the extent of their several liabilities. But only one satisfaction can be had, however, of the whole debt. When that sum is collected the rights of the obligees is exhausted. *Bank of Brighton v. Smith*, 12 Allen, 243.

There was no plea of payment, nor is there anything in the record to show that the contract has been satisfied, either in whole or in part. There was, therefore, no error.

The judgment is affirmed, with costs.

Filed Feb. 22, 1889.

 Ryker, Administrator, v. Vawter.

No. 13,592.

117	425
141	579

RYKER, ADMINISTRATOR, v. VAWTER.

DECEDENTS' ESTATES.—Sale of Real Estate.—Mortgage Lien.—Priorities.—Adjudication.—Where, in a proceeding by an administrator to sell real estate to pay debts, which are not shown to be senior claims, a mortgagee, by cross-complaint, asks the foreclosure of his mortgage, and it is ordered that the mortgage be foreclosed as to part of the real estate embraced therein, and that the remainder be sold by the administrator discharged of liens, any deficiency in favor of the mortgagee to be paid by such administrator, in its order of priority, upon the further order of the court, no question of priority as between the mortgage and the debts for the payment of which the land is asked to be sold is adjudicated.

SAME.—Sale of Land Discharged of Liens.—Application of Proceeds.—Mortgage.—Costs, Funeral Expenses, etc.—One holding a mortgage executed by a decedent upon real estate which an administrator is ordered to sell discharged of liens, is entitled, under section 2435, R. S. 1891, to have the entire proceeds of the sale applied to the payment of his mortgage debt, if so much is necessary, to the exclusion of claims for costs of administration, funeral expenses and expenses of last sickness.

From the Jefferson Circuit Court.

A. D. Vanosdol, H. Francisco, J. H. Bowden, R. Reid and A. E. Richards, for appellant.
J. W. Link and C. E. Walker, for appellee.

BERKSHIRE, J.—The court below sustained exceptions to the partial report made by the appellant in settlement of his trust, and this is an appeal from the order of the court in that particular. The facts which are disclosed by the record are about these:

That, on the 7th day of September, 1886, the administrator filed his partial report, wherein he stated that there had come into his hands the sum of \$193.85, and that he had paid out \$118.84, leaving a balance still in his hands of \$75.01; that there is an outstanding indebtedness still due the estate, amounting to \$297.05; that there are no other

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assets of said estate, and it will have to be settled as an insolvent estate; that the sum of \$193.85 is made up in part of an item of \$160 arising from the sale of real estate made pursuant to the order of the court by the administrator for the payment of debts; that the credit of \$118.84 is made up of three items, viz., cash paid to the clerk of the court in full of costs to date of report, \$58.84; amount due the administrator for services, \$30; cash paid to attorneys for services rendered, \$30.

Sarah E. Vawter, the appellee and a creditor of the estate, filed exceptions to the report, which exceptions, together with the report, were submitted to the court, and, after hearing evidence, the court disallowed the two \$30 items, and \$7.80 of the \$58.84 item, and the appellant reserved the proper exceptions. It is shown that the decedent in his lifetime owned two certain tracts of land, and a few years before his death had conveyed one of these tracts to his son, Lyman H. Thornton, but the deed was not recorded for some years after its execution; that, after the execution of said deed, the appellee, without notice thereof, loaned to the decedent, on the 23d day of July, 1883, \$400, for which she took his note and a mortgage to secure the same on the said two tracts of land, and had the same duly recorded; that, on the 17th day of October, 1885, said administrator filed his petition in said court to sell real estate for the payment of debts, the real estate described in said petition being the said two tracts of land mentioned above; that to this petition the said Sarah E. Vawter was made a defendant, served with process, and filed a cross-complaint asking a foreclosure of her said mortgage and an order for the sale of all of said real estate to pay her debt; that such proceedings were had that the court rendered a judgment against said estate for the sum of \$496.50 and for costs, in favor of the appellee, and rendered a decree foreclosing said mortgage as to the tract of land which the decedent had conveyed to his son, and that the same be sold upon an order of sale as other lands are

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sold upon execution ; that as to the other tract of land the decree and order of the court was, that the same be sold by the administrator for the payment of debts, discharged of liens ; that it was a condition of said decree that if the tract of land upon which the mortgage was foreclosed did not sell for a sum sufficient to pay the judgment of the appellee, with costs, the deficiency be paid by said administrator in due course of administration, in its order of priority, out of any assets of said estate in his hands applicable thereto upon the further order of the court ; that the tract of land upon which the appellee's mortgage was foreclosed was sold on execution, and after payment of costs there yet remained unpaid of appellee's judgment \$196 ; that the item of \$160 was the sum total realized by the administrator from the sale of the said real estate sold by him.

There are several errors assigned, but it is not necessary that we call especial attention thereto.

There are but two questions discussed. The errors assigned properly present these questions for our consideration :

1. Were the priorities of the parties adjudicated and determined in the proceedings growing out of the filing of the petition to sell real estate by the administrator? We think not. There is an allegation in the petition that the costs of administration, etc., are superior to the lien of the mortgage of the appellee, but that is the statement of a conclusion of law merely, and is, consequently, of no importance.

The finding and order of the court settle nothing as to the priority of liens or claims against the estate.

The order is, that, when the real estate upon which the mortgage was foreclosed is sold, if there is not a sum sufficient realized to pay the amount due to the appellee in full, the deficiency shall be paid out of the assets in the hands of the administrator applicable thereto, upon the order of the court, thus expressly leaving all questions of priority open for further consideration.

2. Is the appellee entitled to have the fund in the hands

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of the administrator, arising from the sale of real estate made by him, applied to the payment of the balance still due to her, as against the costs of administration, funeral expenses, and expenses of last sickness?

We are of the opinion that this is her right.

The lien of the appellee was a specific lien, created by the decedent in his lifetime, and, the real estate having been sold freed of the lien, it followed the fund in the hands of the administrator. Section 2435, R. S. 1881. Costs of administration, funeral expenses, and expenses of last sickness, are claims that did not exist for years after the appellee's lien was created.

Ordinarily, the senior lien is the superior one, and there is nothing to bring the case under consideration within any exception to this general rule.

The rights of the parties, as we think, are regulated and controlled altogether by statute.

Upon an application by an administrator to sell real estate for the payment of debts, the court must make one of two orders where there are liens: (1) to sell subject to the liens; or (2) to sell in discharge thereof. Section 2435, *supra*.

When the sale is made subject to a lien, the lien remains intact, and it is expressly provided by the statute that the lien-holder shall not share in the distribution of the fund.

When the sale is made to discharge a lien, it is expressly provided that the moneys arising from the sale shall be applied to the payment of the lien. Section 2435, *supra*.

This section is not in conflict with section 2378, R. S. 1881, nor does the one modify the other. Section 2378 has reference to the general fund in the hands of the administrator, while section 2435 refers to a particular fund or property.

The order, as we have seen, in the case under consideration, was to sell the real estate discharged of the appellee's lien, and, in obedience to section 2435, *supra*, the proceeds of the sale must be applied in discharge of the lien.

Counsel for the appellant have filed a very able and ex-

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haustive brief, but in view of the statutory provisions referred to we are of the opinion that the order and judgment of the court below must be affirmed.

Judgment affirmed, with costs.

Filed Feb. 21, 1889.

No. 13,522.

HALL ET AL. v. DURHAM.

REPLEVIN.—Complaint.—Description.—A complaint in replevin describing the property as “one hundred bushels of wheat of the value of \$100, said wheat having grown in and harvested on the 23th and 29th of July, 1885, having been threshed off the following described real estate and the wheat ground situate thereon,” describing the real estate, is sufficient after verdict.

SAME.—Verification of Complaint by Attorney.—Under section 1547, R. S. 1881, a complaint in replevin need not be verified by the plaintiff in person, but it may be verified by the attorney for the plaintiff, as his agent.

SAME.—Mortgage.—Foreclosure.—Purchaser at Sheriff's Sale.—Crops.—Demand.—A purchaser of land at sheriff's sale, under a decree of foreclosure, upon receiving a deed becomes entitled to the immediate possession of the premises, and crops thereafter sown and harvested by the mortgagor or his lessee, without the purchaser's consent, belong to the latter, and he may maintain replevin therefor without first making a demand.

From the Montgomery Circuit Court.

M. E. Clodfelter, T. E. Ballard and J. A. Lindley, for appellants.

J. R. Courtney, for appellee.

OLDS, J.—This is an action of replevin commenced be-

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fore a justice of the peace for one hundred bushels of wheat, alleged to be of the value of \$100.

There was an appeal taken to the circuit court; trial by the court; special finding of facts and judgment for appellee.

Two objections are urged to the complaint. The first is, that the description of the property is too vague and indefinite. The property is described as "one hundred bushels of wheat of the value of \$100, said wheat having grown in and harvested on the 28th and 29th of July, 1885, having been threshed off the following described real estate and the wheat ground situate thereon, to wit." Then follows a description of the real estate.

The complaint is sufficient after judgment. *Powell v. Stickney*, 88 Ind. 310; *Malone v. Stickney*, 88 Ind. 594.

The second objection urged is, that the complaint is not verified by the plaintiff. The complaint is verified by John R. Courtney, the attorney for the plaintiff, who makes the affidavit as plaintiff's agent.

Section 1547, R. S. 1881, does not require the complaint to be verified by the plaintiff in person. The complaint was properly verified.

The court found the facts to be, that, on the 16th day of May, 1882, the plaintiff, William H. Durham, recovered a judgment against the appellant Hall for the sum of \$275, and the additional sum of \$87.92 costs, and a decree for the sale of the following described real estate to satisfy said judgment, to wit: The east half of the southwest quarter of section 21, town. 18 north, of range 5 west, in Montgomery county, Indiana; that, by virtue of a certified copy of said judgment and decree to him directed, the sheriff of said county, on the 24th day of May, 1883, sold said real estate to said Durham, and executed to him a certificate of purchase therefor; that afterwards, to wit, on the 21st day of June, 1884, the sheriff, in pursuance of said certificate, executed to Durham a deed for said real estate; that, on the 26th day of September, 1884, in an action between Durham,

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appellee, and appellants Hall and Hall, in the Montgomery Circuit Court, Durham recovered a judgment against Hall and Hall quieting his, Durham's, title to said real estate, his right of action being based upon said deed; that in the action in the Montgomery Circuit Court between appellee, Durham, as plaintiff, and appellants Hall and Hall, as defendants, commenced March 12th, 1885, Durham, on the 18th day of June, 1885, recovered a judgment for the possession of said real estate, the plaintiff's right of recovery being based upon said deed and judgment quieting title; that ever since the 26th day of June, 1884, appellee, Durham, has been the owner and entitled to the possession of said real estate; that the appellants Hall and Hall were, on the 26th day of June, 1884, and for thirty years prior thereto, in possession of said real estate, and ever since have been wrongfully and unlawfully in the possession thereof, and claiming title thereto adverse to the plaintiff, but without any color or right of title whatever; that during all of said time the appellee, Durham, has been entitled to the possession thereof; that, on the — day of August, 1884, the appellant George Barclay, by virtue of a lease or contract with appellant John R. Hall, and without the consent of appellee, entered upon said real estate and sowed thereon a crop of wheat which he afterwards, in the summer of 1885, harvested and threshed, and put in a building on said real estate, and that there were sixty-three bushels and fifty pounds of said wheat; that, on the 29th day of July, 1885, this action was commenced, and at the time of the commencement of this suit the wheat was of the value of \$50; that said wheat was not taken by virtue of any execution or other writ against Durham or his property; that by virtue of the writ of replevin in this suit, on the 29th day of July, 1885, said wheat was seized and placed in the possession of the appellee, Durham, and he now holds possession of the same; that, previous to the bringing of this suit, neither the appellee nor any

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person in his behalf made any demand of the appellants for the possession of said wheat.

The court, upon these facts, stated the following conclusions of law :

1st. The appellee is the owner and entitled to the possession of the wheat described in the complaint, to wit: 63 bushels and 50 pounds.

2d. That the wheat is of the value of \$50.

3d. That the appellants, at the time this suit was commenced, had possession of said wheat and unlawfully and without right detained the possession thereof from the appellee.

To the conclusions of law the appellants excepted and assign as error that the court erred in the conclusions of law.

It is contended by counsel for the appellants that, as the finding of facts shows the appellant Hall in possession of the real estate at the time he leased the land to appellant Barclay and remaining in possession of the same up to the time this suit was commenced, and that as he was claiming possession of the same, Hall was entitled to the wheat; that at least an action could not be maintained against Barclay in replevin until demand had been made; that, having rented of a person in actual possession, he had rightful possession, and his detention would not be unlawful until after demand for possession by appellee. Counsel further maintain that appellee only became entitled to crops by the execution of the writ issued upon his judgment for the possession, and then only to the crops unharvested at the time the writ was executed and possession turned over to the appellee.

We can not concur in this theory.

It is an elementary principle that a deed to real estate carries with it the right of possession. In the case of *Jones v. Thomas*, 8 Blackf. 428, it is said: "If land mortgaged be sold under a decree of foreclosure, the purchaser will be entitled to the crops growing at the time of the sale, in prefer-

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ence to a person claiming under the mortgagor and whose claims originated subsequently to the mortgage."

In the case of *Heavilon v. Farmers Bank of Frankfort*, 81 Ind. 249, the court refers to the case of *Jones v. Thomas*, *supra*, and says: "When *Jones v. Thomas*, *supra*, was decided, it was the established doctrine here, as elsewhere, that a mortgage transferred the title to the mortgagee, and, after condition broken, if not before, enabled him to maintain ejectment, and this led, inevitably, to the conclusion declared in that case. The rule, now well established, however, is, that a mortgage creates no estate in the mortgagee, but confers on him only a lien upon the estate of the mortgagor, which estate, by force of the mortgage, can be transferred to the mortgagee only by a foreclosure and sale according to law. When such foreclosure and sale can or will be accomplished in any case, can not be anticipated, and so the term of tenancy being uncertain, the case comes under the general rule already stated; besides the statute of redemption now prolongs the right of possession of the land-owner or occupant beyond the time of sale, whether upon execution or decree, for the period of one year. When that year will terminate can not be known, of course, until the sale has been made, or, at least, advertised. After a sale has been made, or perhaps advertised, it would seem that, as against the purchaser, the tenant who would sow must do it at his peril."

It was formerly the well settled rule that when a mortgagee obtained the absolute estate in fee of the mortgaged premises, by becoming the purchaser under a foreclosure and sale, he was entitled to the emblements, and might maintain trespass against the mortgagor or his lessee for taking and carrying away the crops growing at the time of the sale.

This rule must certainly apply with full force as to crops sowed upon the land, after deed issues, without the consent of the purchaser, even if it does not apply to crops sowed before

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with the knowledge that they will not ripen and can not be harvested until after the deed issues.

This doctrine is decisive of the questions presented in this case. Appellee foreclosed his mortgage, sold the real estate, and obtained his deed therefor on the 21st day of June, 1884. On the 26th day of September, 1884, appellee recovered a judgment against the mortgagors quieting his title to the real estate, and on June 18th, 1885, he recovered a judgment against the same parties for the possession of the real estate. These several causes of action grew out of the mortgage.

From the receipt of the deed for the premises he was entitled to the possession, and the detention after that time was unlawful and without right.

After the deed was executed, Hall, the mortgagor, leased the premises to Barclay, who sowed the wheat crop in the fall of 1884, and harvested the wheat in question in this case in the summer of 1885. Barclay had no greater rights than his lessor, and Hall's possession being without right, Barclay's was also without right, and the detention of the premises and wheat sowed and harvested upon the land after the deed issued to appellee in pursuance of the foreclosure and sale, was without right and unlawful, and no demand was necessary before suit.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed Feb. 21, 1889.

The Louisville, New Albany and Chicago Railway Company v. Snyder.

No. 13,475.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY COMPANY v. SNYDER.

EVIDENCE.—*Physician.*—*Expert.*—*Personal Injury.*—*Opinion.*—A physician, testifying as an expert, may give an opinion as to the nature and extent of an injury to the person, which is based in part on statements made to him by the injured party.

NEGLIGENCE.—*Common Carrier.*—*Injury to Passenger.*—*Pre-existing Disease.*—The right of a passenger to recover for an injury caused by the negligence of a railroad company is not impaired by the fact that he was afflicted with Bright's disease at the time he was injured.

SAME.—*Degree of Care Required of Carrier.*—Carriers are bound to use the highest practicable degree of care to secure the safety of passengers, and any omission to exercise that degree of care constitutes actionable negligence.

SAME.—*Presumption of Negligence.*—*Burden of Proof.*—The burden of overcoming the presumption of negligence arising from evidence of the occurrence of an accident and injury to a passenger, is upon the carrier.

SAME.—*Bridges.*—*Construction and Maintenance.*—*Inspection.*—A carrier, in the construction and maintenance of its bridges, can not rest upon the reputation of manufacturers and the external appearance of materials. It is bound to test and inspect such materials before they are put in place, and also from time to time during their use.

From the Clinton Circuit Court.

S. O. Bayless and W. H. Russell, for appellant.

T. H. Palmer, W. F. Palmer, B. K. Higinbotham and M. Bristow, for appellee.

ELLIOTT, C. J.—The appellee was a passenger on one of the appellant's trains, which, by the falling of a bridge, was precipitated into White River, and the appellee severely injured.

Dr. Bowles, an expert witness called by the appellant, gave an opinion as to the nature and extent of the injury sustained by the appellee, and on cross-examination it was developed that his testimony was in part based on statements made to him by the appellee.

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Waiving all questions of practice, and deciding the appellant's motion to strike out, as if it were properly restricted to the alleged incompetent part of the testimony, we have no hesitation in deciding that the trial court did right in overruling the motion. As we have often decided, the physical organs of a human being can not be inspected by the eyes of a surgeon, and the statements of the sufferer must, of necessity, be taken by the surgeon. It is not possible for any surgeon, by a mere external examination, to always discover the character of an injury, and properly describe or treat an injured man, and for this reason, if for no other, the statements of the injured person, descriptive of present pains or symptoms, are always competent, although narratives of past occurrences are inadmissible. On this point our own decisions are harmonious, and they are right upon principle, and are well supported by authority. *Cleveland, etc., R. R. Co. v. Newell*, 104 Ind. 264; *Louisville, etc., R. W. Co. v. Falrey*, 104 Ind. 409; *Louisville, etc., R. W. Co. v. Wood*, 113 Ind. 544; *Board, etc., v. Leggett*, 115 Ind. 544; *Hatch v. Fuller*, 131 Mass. 574; *Atchison, etc., R. R. Co. v. Johns*, 36 Kans. 769; *Quaife v. Chicago, etc., R. W. Co.*, 48 Wis. 513. From these decisions we shall not depart.

The fact that the appellee was suffering from Bright's disease at the time he was injured does not impair his right of recovery. The rule is this: "Where a disease caused by the injury supervenes, as well as where the disease exists at the time of the injury, and is aggravated by it, the plaintiff is entitled to full compensatory damages." *Ohio, etc., R. R. Co. v. Hecht*, 115 Ind. 443. *Louisville, etc., R. W. Co. v. Wood, supra*; *Indianapolis, etc., R. W. Co. v. Pitzer*, 109 Ind. 179; *Terre Haute, etc., R. R. Co. v. Buck*, 96 Ind. 346; *Ehrgott v. Meyer*, 96 N. Y. 246; *Jucker v. Chicago, etc., R. W. Co.*, 52 Wis. 150; *Denver, etc., R. W. Co. v. Harris*, 122 U. S. 597; *Lake Shore, etc., R. W. v. Rosenzweig*, 113 Pa. St. 519; *Houston, etc., R. W. Co. v. Leslie*, 57 Texas, 83.

The rule we have stated is thus expressed in one of our

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best text-books: "Though the plaintiff be afflicted with a disease or weakness which has a tendency to aggravate the injury, the defendant's negligence will still be held to be the proximate cause." Shear. & Redfield Neg. (4th ed.), section 742. The instructions clearly and properly state the law on this subject.

The court did not err in instructing the jury as to the degree of care required of the appellant, at least not as against the appellant. The rule is well settled that carriers are bound to use the highest practicable degree of care to secure the safety of passengers.

There was no evidence of contributory negligence on the part of the appellee, and the court might well have refused any instruction at all upon that point. Where a passenger is in his proper place in the car, and makes no exposure of his person to danger, there can be no question of contributory negligence. Decisions, like that of *Indiana, etc., R. W. Co. v. Greene*, 106 Ind. 279, in cases of persons injured at a railroad crossing, are not applicable to such a case as the one at our bar.

The law is, as the jury were told, that carriers of passengers are liable for the slightest negligence. Any negligence on their part is actionable. *Bedford, etc., R. R. Co. v. Rainbolt*, 99 Ind. 551.

The law will not tolerate any negligence on the part of carriers, although they are not insurers of the safety of their passengers.

The burden of overcoming the presumption of negligence arising from evidence of the occurrence of an accident and injury to a passenger, is upon the carrier. *Memphis, etc., Packet Co. v. McCool*, 83 Ind. 392; *Terre Haute, etc., R. R. Co. v. Buck, supra*; *Cleveland, etc., R. R. Co. v. Newell, supra*; *Bedford, etc., R. R. Co. v. Rainbolt, supra*; *Anderson v. Scholey*, 114 Ind. 553.

In *Louisville, etc., R. W. Co. v. Pedigo*, 108 Ind. 481, the

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rule was applied in a case growing out of the same occurrence as that in which the appellee was injured.

✓ The twenty-second instruction asked by the appellant and refused, reads thus :

“ The court further instructs you that by ‘ negligence,’ when used in these instructions, is meant either the failure to do what a reasonable person would ordinarily have done under the circumstances of the situation, or doing what such person would not have done under the existing circumstances.”

This instruction was properly refused. It is not proper in such a case as this to define negligence as it is defined in this instruction. In a case of this character the omission to exercise the highest degree of practicable care constitutes negligence, but in other cases the failure to exercise ordinary care constitutes negligence. Counsel are greatly in error in asserting, as they do, that the instruction correctly furnishes the standard for the government of the jury. The appellant was, as we have substantially said, bound to do more than prudent men would ordinarily do, since it was bound to use a very high degree of care.

The duty of a railroad company engaged in carrying passengers is not always discharged by purchasing from reputable manufacturers the iron rods or other iron-work used in the construction of its bridges. The duty of the company is not discharged by trusting, without inspecting and testing, to the reputation of the manufacturers and the external appearance of such materials. The law requires that before the lives of passengers are trusted to the safety of its bridges, the company shall carefully and skilfully test and inspect the materials it uses in such structures. This duty of inspection does not end when the materials are put in place, but continues during their use, for the company is bound to test them from time to time to ascertain whether they are being impaired by use or exposure to the elements. *Manser v. Eastern, etc., R. W. Co.*, 3 L. T., N. S., 585;

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Texas, etc., R. W. Co. v. Suggs, 62 Texas, 323 (21 Am. & Eng. R. R. Cases, 475); *Stokes v. Eastern, etc., R. W. Co.*, 2 F. & F. 691; *Robinson v. New York, etc., R. R. Co.*, 9 Fed. Rep. 877; *Richardson v. Great Eastern R. W. Co.*, L. R., 10 C. P. 486; S. C., L. R., 1 C. P. Div. 342; *Ingalls v. Bills*, 9 Met. 1; *Funk v. Potter*, 17 Ill. 406; *Bremner v. Williams*, 1 Car. & P. 414; *Hegeman v. Western R. R. Co.*, 13 N. Y. 9; *Alden v. New York Central R. R. Co.*, 26 N. Y. 102.

The decision in the case of *Grand Rapids, etc., R. R. Co. v. Boyd*, 65 Ind. 526, is not in conflict with this doctrine, for in that case an inspection was made.

Judgment affirmed.

Filed Feb. 21, 1889.

No. 13,330.

THE CINCINNATI, HAMILTON AND DAYTON RAILROAD
COMPANY v. McMULLEN, ADMINISTRATOR.

JURISDICTION.—*Actions for Personal Injuries.*—Actions for the recovery of damages for personal injuries, or for pecuniary loss resulting from the death of a person by the wrongful act of another, are transitory in character, and arise out of the violation of rights which are neither local nor confined to the State where they accrued.

SAME.—*Rights Accruing in Another State.*—The jurisdiction of courts to entertain actions or enforce rights which accrued in a foreign State does not depend upon whether the rights are of statutory or common law origin, provided they accrued under a statute similar in import and character to one in force in the jurisdiction in which the remedy is sought.

RAILROAD.—*Duty to Provide Safe Machinery.*—*Liability to Employee.*—It is the duty of a railroad company to provide and maintain reasonably safe and suitable cars and other appliances for its employees to work

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with, and a failure to discharge this duty, no matter to whom the company may have committed its performance, renders the company liable to an employee who is injured without his fault.

SAME.—Fellow Servants.—Car Inspector and Trainmen.—A car inspector, in the employment of a railroad company, upon whom is enjoined the duty of inspecting the company's cars, is not a co-employee of a brakeman, or of a conductor of a freight train who, in the line of his service, is discharging the duties of brakeman, within the meaning of the common law rule exempting a master from liability for the negligence of a fellow servant.

SAME.—Freight Conductor.—Inspection of Cars.—Presumption.—There is no legal presumption that it is the duty of the conductor of a freight train to inspect the cars and machinery of his train, or that he is chargeable with negligence for using unsafe cars if the defect was such that it might have been discovered by inspection.

SAME.—Evidence.—Rules of Company.—Parol evidence that it was the duty of a freight train conductor on the defendant's road to inspect the couplings and brakes connected with his train, is not admissible, in the absence of a showing that such duty was not prescribed by a written or printed rule duly adopted and promulgated.

SAME.—Rules of Another Company.—The rules of another separate and apparently independent railroad company are not competent evidence to show the duties of a conductor on the defendant's road, until it is shown by competent evidence that they had been adopted and promulgated as the rules of the defendant.

SAME.—Instruction to Jury.—Province of Court.—It is not the province of the court to say to the jury as matter of law, in an action for damages, what facts and circumstances are sufficient to show that the death of the plaintiff's intestate was caused by defective machinery.

SAME.—Circumstantial Evidence of Injury.—If, from all the facts and circumstances proved in the case, the inference arises that the deceased was exercising proper care, and that his death was caused while using a defective brake on one of his employer's cars, a recovery is justified, even though no direct evidence is given by persons who saw the accident.

LAW OF ANOTHER STATE.—Pleading and Proof.—Judicial Notice.—The law of another State, whether declared by judicial decisions or otherwise, if relied on to defeat an action alleged to have accrued in that State and sought to be enforced here, must be pleaded and proved, as judicial notice thereof will not be taken for such purpose.

From the Wayne Circuit Court.

R. D. Marshall and H. C. Fox, for appellant.

C. H. Burchenal and J. L. Rupe, for appellee.

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MITCHELL, J.—McMullen, as administrator of the estate of Stephen Wiggins, deceased, brought this action against the railroad company above named to recover the pecuniary loss resulting to the wife and children of the decedent, whose death is alleged to have been wrongfully caused by the neglect of the company.

It appears from the complaint that the intestate was a conductor on one of the railroad company's freight trains, and that his death was caused on the 3d day of February, 1885, in the city of Cincinnati, Ohio, by reason of the defective and dangerous condition of a brake on one of the company's cars.

A statute of the State of Ohio, giving a right of action, to be prosecuted in the name of the personal representative for the benefit of the wife or husband and children, whenever the death of a person has been caused by the wrongful act, neglect or default of another, is incorporated in the complaint. This statute is in no material respect variant from the one covering the same subject as found in section 284, R. S. 1881.

An elaborate argument is submitted in support of the proposition that actions like the present, which were unknown to the common law and are wholly of statutory origin, can only be maintained within the jurisdiction in which the right of action accrued. Hence it is contended, the injury and death having occurred in the State of Ohio, and the right of action, if any existed, having been given by the statute of that State, that the courts of Indiana are without jurisdiction to enforce the statute of the former State.

Since the appeal was taken in the present case, this court has decided the question thus presented adversely to the view contended for by the appellant. *Burns v. Grand Rapids, etc., R. R. Co.*, 113 Ind. 169.

We arrived at the conclusion in the case cited that actions for the recovery of damages for personal injuries, or for pecuniary loss, are transitory in character, and arise out of the

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supposed violation of rights which, in legal contemplation, are neither local nor confined to the State where the right accrued. The further conclusion was arrived at, that, according to the weight of authority, as well as upon principle, the jurisdiction of courts to entertain actions or enforce rights which accrued in a foreign State did not depend upon whether the right sought to be enforced was of statutory or of common law origin, provided the right accrued under a statute similar in import and character to one in force in the jurisdiction in which the remedy was sought. Adhering to the conclusions there stated, it follows that the action was well brought in the court below.

The plaintiff's case proceeded upon the theory that his intestate's death was caused by the negligence of the railroad company in allowing one of its cars, with a defective brake, to be put into a train at Richmond, Indiana, of which the intestate was put in charge as conductor.

There was evidence tending to show that the latter went upon the car in the company's yard at Cincinnati, the brakemen being necessarily otherwise engaged at the time, and while attempting to control the movement of the car by the use of the brake, the handle to that appliance suddenly gave way, or slipped off, thereby causing the decedent to lose his balance and fall between the moving cars, one of which passed over his body, crushing him to death.

The theory of the appellant company was, that if the intestate's death was occasioned by the negligence of anyone, it was the fault of the car inspector at Richmond, Indiana, where the train was made up, and that the car inspector was a co-employee with the plaintiff's intestate. Hence, the insistence is, there can be no recovery, upon the principle that an employer is not liable to an employee for an injury occasioned by the negligence of a co-employee while both are engaged in a common service.

The instructions of the court relevant to that feature of

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the case were adverse to the appellant's view, and they are now made the subjects of complaint.

That one who engages in the service of a railroad company is presumed to be acquainted with, and to take upon himself, all the ordinary risks incident to the service, including the risks arising from the negligent conduct of co-employees, in whose selection and retention proper care has been exercised, is too well settled to admit of further discussion. It is also a well established rule that all those who are subject to the same general control, and are co-operating in the prosecution or accomplishment of the same general end and purpose, are, while engaged in the common pursuit, without regard to their relative rank, co-employees. *Indiana Car Co. v. Parker*, 100 Ind. 181; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Gormley v. Ohio, etc., R. W. Co.*, 72 Ind. 31; *Brazil, etc., Coal Co. v. Cain*, 98 Ind. 282.

It is, however, the duty of a railroad company to provide and maintain reasonably safe and suitable cars and other appliances for its employees to work with, and it can not escape liability to an employee, who, without fault or neglect on his part, suffers injury from the use of defective appliances or implements, by showing that the failure to discover and amend the defect was attributable to the neglect of an agent of the company to whom the duty of selecting and inspecting its cars and their appendages had been committed. An employee is required to observe and avoid all known or obvious perils, even though they may arise from defective machinery and appliances; but he is not bound to search for defects, or make a critical inspection of the appliances which are provided for his use. These are duties of the employer, who is required not only to furnish reasonably safe and suitable tools and machinery, but to exercise such a continuing supervision over them, by such reasonably careful and skillful inspection and repair, as will keep the implements which employees are required to use in such a condition as not unnecessarily to expose them to unknown and extraordinary

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hazards. *Louisville, etc., R. W. Co. v. Buck*, 116 Ind. 566, and cases cited.

Whoever is appointed or permitted to discharge duties which pertain to the station or function of employer, must, upon the plainest principles of reason and justice, be held to stand as the representative of the employer, and, in case injury results from his neglect, the latter must answer for his delinquency.

When the premise is conceded, that the duty to furnish reasonably safe and proper instrumentalities for the performance of the work required rests upon the employer, the conclusion logically follows that the consequences of a negligent failure to perform that duty must, no matter to whom it may have been committed, be visited upon the employer, and not upon the employee who suffered injury therefrom.

It can not be said that a car inspector, in the employment of a railroad company, upon whom is enjoined the duty of inspecting the company's cars, is a co-employee of a brakeman, or of one who is in the line of his service discharging the duties of brakeman, within the meaning of the common law rule which exempts a master from liability for injuries to a servant resulting from the negligence of a fellow-servant. *Bushby v. New York, etc., R. R. Co.*, 107 N. Y. 374; *Fay v. Minneapolis, etc., R. W. Co.*, 30 Minn. 231; *Macy v. St. Paul, etc., R. R. Co.*, 35 Minn. 200; *Condon v. Missouri Pacific R. W. Co.*, 78 Mo. 567; *Missouri, etc., R. W. Co. v. Dwyer*, 36 Kan. 58; *King v. Ohio, etc., R. R. Co.*, 8 Am. & Eng. R. R. Cas. 119; *Brann v. Chicago, etc., R. R. Co.*, 53 Iowa, 595.

After a careful examination of the authorities, the rule applicable to the point under consideration was well stated in *Northern Pacific R. R. Co. v. Herbert*, 116 U. S. 642, in the following language: "If no one was appointed by the company to look after the condition of the cars, and see that the machinery and appliances used to move, and to stop them, were kept in repair and in good working order, its liability

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for the injuries would not be the subject of contention. Its negligence in that case would have been in the highest degree culpable. If, however, one was appointed by it charged with that duty, and the injuries resulted from his negligence in its performance, the company is liable. He was, so far as that duty is concerned, the representative of the company; his negligence was its negligence."

As applied to the cars and instrumentalities furnished by the railroad company itself, the rule thus enunciated meets our approval.

In respect to cars received by one railroad company from another in the course of transportation, since the duty of the receiving company is to receive and forward the cars over its road, the rule above enunciated is not applicable in its strictness. In such a case it may be said with much plausibility, that it is not the duty of the company to furnish appliances and instrumentalities, but to make proper inspection and give notice of defects if any are found, and that this duty is performed by the employment of a sufficient number of competent and skilful inspectors, who are subjected to proper rules and instructions. In cases of that class, it has been held that inspectors of cars, and those acting as brakemen, were fellow-servants within the common law rule. *Mackin v. Boston, etc., R. R. Co.*, 135 Mass. 201; *Keith v. New Haven, etc., Co.*, 140 Mass. 175; *Smith v. Flint, etc., R. W. Co.*, 46 Mich. 258; *Railroad Co. v. Fitzpatrick*, 42 Ohio St. 318.

The suggestion is made, that by the law of the State of Ohio, as declared by the courts of that State, car inspectors and brakemen are co-employees, and that hence, under the rulings in that jurisdiction, no right of action arises in favor of the latter growing out of injuries caused by the negligence of the former.

It is a familiar principle that a cause of action can not be asserted in one jurisdiction for a wrong or injury which occurred in a foreign State, unless an action might have been

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maintained in the jurisdiction where the injury occurred. *Burns v. Grand Rapids, etc., R. R. Co.*, 113 Ind. 169, and cases cited. We can not, however, take judicial notice of the common law of the State of Ohio, or of any other foreign State. For some purposes this court may take judicial notice of the judicial decisions of all the States. But as matters of law or fact, applicable to a particular case, the law of a foreign State, whether declared by judicial decisions or otherwise, must be pleaded and proved. That was not done in the present case. *Bethell v. Bethell*, 92 Ind. 318; *St. Louis, etc., R. W. Co. v. Weaver*, 35 Kan. 412.

The instructions complained of predicate the right of recovery upon the condition that the jury find the company negligent in the performance of its duty in the respects we have been considering, and upon the further condition that they find that the decedent was "himself free from fault and negligence in the use of such appliances."

The contention that, under the instructions complained of, the plaintiff was entitled to recover by showing that the railroad company or its agents were negligent, without showing that the decedent was exercising due care, is not well founded.

We agree that it was incumbent upon the plaintiff to aver and prove the negligence of the railroad company, and the absence of contributory negligence on the part of the intestate, and that the burden of proof was upon the plaintiff upon both these propositions. An examination of the instructions demonstrates that the case was fairly put to the jury upon that theory.

It is contended that the charge of the court relating to the measure of damages is much too broad. There is force in some of the objections thus urged; but, while we do not approve of the instruction in the broad interpretation which might be given it, we are nevertheless constrained to hold that, taking it altogether, it was capable of such a construction as expressed the proper rule of damages, and that the amount assessed by the jury does not indi-

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cate that they were misled by the charge. *Louisville, etc., R. W. Co. v. Buck, supra.*

Complaint of a general character is made concerning the giving of other instructions by the court, but an examination of the charges complained of fails to disclose anything objectionable in them.

It was not error for the court to refuse to instruct the jury, as requested, to the effect that the decedent, being at the time he was injured the conductor of a freight train, and not under the immediate control of a superior, was therefore the representative of the company, and held to ordinary and reasonable care not only in the management of the train, but in the inspection of the cars, machinery, brakes and the like.

As is correctly stated in the head-note to *Ransier v. Minneapolis, etc., R. W. Co.*, 32 Minn. 331, there is no legal presumption that it is the duty of the conductor of a railway freight train to inspect the cars and machinery of his train, or that he is chargeable with negligence for using unsafe cars if the defect was such that it might have been discovered by inspection. This being so, the proposition involved in the instruction asked could not be stated as matter of law.

In like manner the court ruled correctly in refusing the fourteenth instruction asked by the appellant, which was to the effect that the mere fact that the deceased was found dead upon the defendant's railroad track, and that it was afterwards discovered that the brake-staff on one of the cars which was part of his train had no brake-wheel upon it, and that a brake-wheel was found near the deceased, was not sufficient to show that his death was caused by any defect in the brake-staff or wheel.

It was not the province of the court to say as matter of law what facts and circumstances were sufficient to show that the death of the intestate was caused by defective machinery. While it is true, as we have seen, that the burden was on the plaintiff to prove that the defendant was negligent, in that it

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supplied defective machinery, and that the intestate was free from fault contributing to his death, it was not necessary to make the proof by direct evidence.

The verdict will be upheld if these facts are made to affirmatively appear either directly or circumstantially. If, from all the facts and circumstances proven in the case, the inference arises that the deceased was at the time exercising proper caution, and that his death was caused while he was using a defective brake on one of the appellant's cars, then a recovery was justified, even though there was no direct evidence given by persons who saw the deceased at the moment he fell under the car. *Indiana, etc., R. W. Co. v. Greene*, 106 Ind. 279; *Burns v. Chicago, etc., R. W. Co.*, 69 Iowa, 450; *Jones v. New York Central, etc., R. R. Co.*, 28 Hun, 364 (92 N. Y. 628).

It is only when the facts and circumstances surrounding the injury point neither one way nor the other that the plaintiff must fail for want of affirmative proof.

At the trial the railroad company proposed to prove by a competent person that it was the duty of a freight conductor on its road to look at and determine the condition of the couplings, brakes, etc., connected with his train, and that he was held responsible for their condition. This testimony was properly excluded.

If there was any such rule or general direction as that proposed to be proved, it was presumably in writing. Such regulations are usually promulgated either by general rules, or orders issued by those having the control or management of the company's affairs. In the absence of any showing that the duties of freight conductors in the respects mentioned were not prescribed by some written or printed rules adopted and promulgated by those having the management of the company, the evidence was properly excluded.

For the same reason the court ruled correctly in excluding parol evidence by which it was proposed to prove that the appellant company was, at the time of the injury complained

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of, under the management of another company, and that the printed rules of the latter company had been adopted by, and extended over, the appellant company.

We must presume, until the contrary appears, that if the two corporations were under one management, and the rules of the other corporation were adopted as the rules governing employees of the appellant, there was in existence some order, instruction or resolution manifesting the facts. The rules of another separate and apparently independent railroad company were not competent evidence to show the duties of the freight conductors on the appellant's road, until it was shown by some proper and competent evidence that they had been adopted and promulgated as the rules of the appellant. Besides, the excluded rule which was offered in evidence is not set out in the bill of exceptions. It does not appear, therefore, that the appellant was harmed by the ruling of the court. *La Rose v. Logansport Nat'l Bank*, 102 Ind. 332.

The evidence tends to sustain the verdict. We have thus examined all the points made on behalf of the appellant, without regard to the motion made to dismiss the appeal. We find no error.

The judgment is affirmed, with costs.

Filed Feb. 21, 1889.

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No. 13,554.

MERCER v. CORBIN.

ASSAULT AND BATTERY.—*Intent.*—There may be an actionable assault and battery, although there is no actual or specific intent to commit that offence.

SAME.—*Constructive Intent.—Riding Bicycle Against Footman.*—One who rudely, and in such a reckless manner as to show a disregard of consequences, rides his bicycle against a person standing upon a town sidewalk, is liable as for an assault and battery, the intent being implied.

SAME.—*Bicycle a "Vehicle."—Use Upon Sidewalk Unlawful.—Personal Injuries.—Damages.*—A bicycle is a vehicle within the meaning of the law, and, therefore, under section 3361, R. S. 1881, its use upon a public sidewalk is unlawful, and its rider liable for an injury inflicted upon a footman, although the act be unintentional.

SUPREME COURT.—*Questions Upon Exclusion of Evidence.—Bill of Exceptions.—Practice.*—Where all the evidence is not in the record, a question relating to the exclusion of evidence will not be considered, unless some statement is embodied in the bill of exceptions showing that the evidence was excluded because deemed intrinsically incompetent.

From the Miami Circuit Court.

S. Keith, J. S. Slick, L. Walker and W. B. McClintic, for appellant.

E. Calkins, G. W. Holman, W. McMahan and J. L. Farrar, for appellee.

ELLIOTT, C. J.—The single count of the complaint charges that the appellant "assaulted, beat and wounded the plaintiff." The answer is the general denial. The issue presented for trial, therefore, was, did the appellant commit an assault and battery upon the person of the appellee?

The material facts embodied in the special verdict may be thus summarized: On the afternoon of the 10th day of May, 1884, the appellee was standing on a public sidewalk in the town of Rochester. He was standing near the outer edge of the pavement, facing the northeast, and the appellant, coming from the west, rode a bicycle against him, threw him

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down and severely injured him. The sidewalk was fourteen feet in width, and there was nothing to obstruct the view or passage of the appellant.

The verdict states that the "defendant carelessly, recklessly and rudely ran against and upon said Corbin."

If the appellant were charged with a tort, based on mere negligence, the right of recovery would be perfectly clear, for there can be no doubt that the appellant was guilty of culpable negligence. The complaint, however, does not proceed upon the theory that the wrong was a mere negligent one, and we can not sustain the recovery upon any other cause of action than that set forth in the complaint. *Feder v. Field*, ante, p. 386; *Palmer v. Chicago, etc., R. R. Co.*, 112 Ind. 250.

There must be something more than a mere negligent touching of a plaintiff's person in order to constitute an assault and battery. It is, however, not essential that there should be a direct or specific intention to commit an assault and battery at the time violence is done a plaintiff. The facts may be such as to create an implied or constructive intention to do a wrongful act, although there is no direct or specific unlawful intention. *Palmer v. Chicago, etc., R. R. Co.*, supra. In the case referred to we said: "The authorities, from the earliest years of the common law, recognize the rule that there may be a wilful wrong without a direct design to do harm. The principle has been applied to furious driving, to collisions between vessels, to the taking of unruly animals into crowds, to carelessly laying out poison for rats, to want of caution towards drunken persons and to the careless casting of logs and the like upon highways. 1 Hale Pleas of the Crown (Am. ed.), 475, and authorities, n. 4; 4 Blackst. Com. 182."

The question is fully and well discussed by Mr. Bishop, who says: "There is little distinction, except in degree, between a positive will to do wrong and an indifference whether wrong is done or not." 1 Bishop Crim. Law, chapter 20.

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The principle we are asserting is strikingly illustrated in the old cases wherein it was affirmed that if a man carelessly casts a log from a window upon a much frequented way and kills another, his offence is murder in the second degree, but if the log is cast upon a highway not much travelled, the offence is manslaughter.

Mr. Addison applies the general principle to cases of assault and battery, saying: "An assault may be committed without any design or intention to commit an assault; for, if the person of one man is violently struck by another, this is an assault; and it is no answer to say that it was done unintentionally, as, for instance, in endeavoring to strike some one else. So, if a man drives against and violently upsets the plaintiff in his carriage, and knocks him down, or overturns the chair in which he is seated, the person thus striking the plaintiff, or knocking him down, is guilty of an assault, although he had no intention to commit an assault." 1 Addison Torts (Wood's ed.), 142.

In our own reports is found a very striking illustration of the principle we are discussing. In the case referred to, a man passing through a public park in the city of Indianapolis in the early morning aimed his pistol at a tree, drew the trigger and killed a lad who was several hundred yards distant, and who was unseen at the time the pistol was discharged, and the court held that the accused was guilty of manslaughter. *Flinn v. State*, 24 Ind. 286.

In the case of *Peterson v. Haffner*, 59 Ind. 130 (26 Am. Rep. 81), a boy, in sport, but wantonly, threw a piece of mortar at another boy and accidentally struck a third, and it was held that he had committed an assault and battery.

The defendant in the case of *State v. Myers*, 19 Iowa, 517, recklessly discharged a pistol into a crowd, but without any intention to hurt any one, and a conviction for assault and battery was sustained.

In *Bullock v. Babcock*, 3 Wend. 391, a boy aimed at a bas-

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ket, the arrow struck the plaintiff, and it was held that an action for assault and battery would lie.

It was held in *Commonwealth v. Lister*, 15 Phila. Rep. 405, that a man who fired a pistol intending to shoot through the floor of a Pullman car, but accidentally hit a bystander, was rightly convicted of assault and battery.

These cases fully serve our purpose, for they sufficiently prove that there may be an actionable assault and battery, although there is no actual or specific intent to commit that offence. They are, in truth, no more than examples of the general rule everywhere prevailing, that from recklessness and wanton disregard of human life and safety malice and criminal intent may be inferred. *Johnson v. McConnell*, 15 Hun, 293; *Ricker v. Freeman*, 50 N. H. 420; *Vandenburg v. Truax*, 4 Denio, 464; *Welch v. Durand*, 36 Conn. 182; *Morris v. Platt*, 32 Conn. 75; *Clark v. Chambers*, L. R. 3 Q. B. Div. 327; S. C. 17 Alb. L. J. 458; *Wright v. Clark*, 50 Verm. 130, 135; *Regina v. Salmon*, 23 Alb. L. J. 1.

The specific facts stated in the verdict justify the finding of the jury that the act of the appellant was a rude and reckless one, and they also justify the legal conclusion that there was such a reckless disregard of consequences as to imply an intention to assault the appellee. They fully supply the grounds for inferring the constructive intent which makes a wrongful act wilful or intentional. There was at least ten feet of the sidewalk entirely unobstructed, and the slightest regard for the safety of the appellee would have enabled the appellant to have avoided doing harm to him. There is no reason why the appellant might not, with the slightest care, have passed the appellee, and his failure to use this care implies a willingness to inflict the injury which he did in fact inflict upon the appellee. As the consequences of his wrongful and reckless disregard of the rights of others led to the injury, he must, under the familiar rule, be presumed to have intended that such consequences should result. *Peterson v. Haffner*, *supra*. If, therefore, it be conceded that the appel-

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lant had a right to ride his bicycle upon a way set apart for the use of footmen, he is nevertheless liable in this action.

Whether the appellant had a right to ride his bicycle upon the footway is a question which deserves consideration. This question would be important in the absence of any statute, and it is the more important because of our statute, which reads thus: "It shall be unlawful for any person to ride or drive upon the brick, stone, plank, or gravel sidewalk of any town or village, or upon any similar sidewalk for the use of foot passengers by the side of any public highway in this State, unless in the necessary act of crossing the same." R. S. 1881, section 3361.

Sidewalks are intended for the use of pedestrians, and not for use by persons in vehicles. The manifest purpose of the statute is to preserve the sidewalks from use by persons in or on vehicles, and if a bicycle can be deemed a vehicle, then the appellant had no right to ride or drive his bicycle longitudinally along the sidewalk. If sidewalks are exclusively for the use of footmen, then bicycles, if they are vehicles, must not be ridden along them, since to affirm that sidewalks are exclusively for the use of footmen necessarily implies that they can not be travelled by vehicles. It would be a palpable contradiction to affirm that footmen have the exclusive right to use the sidewalks, and yet concede that persons not travelling as pedestrians may also rightfully use them. A person on a bicycle is certainly not a footman, and if not, then he makes an unlawful use of the sidewalk when he rides or drives his bicycle longitudinally along it. It would seem to follow that even if a bicycle can not be considered to be a vehicle, still it is unlawful to ride or drive it along a way set apart for the exclusive use of pedestrians. We think, however, that a bicycle must be regarded as a vehicle within the meaning of the law.

Webster defines a bicycle as a "two-wheeled velocipede," and a velocipede is defined to be a "light carriage." Sub-

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stantially the same definition is given by a law-writer. 2 Am. & Eng. Encyclopædia of Law, 191.

Under these definitions it must be regarded as a sort of vehicle, and so the courts have regarded it. In one case, the title of which can not now be recalled, it was held that a bicycle was entitled to the "rights of the road," as other vehicles, and a driver of a wagon, who refused to turn to the right, and thus caused a collision with a bicycle, was held liable.

In *Taylor v. Goodwin*, L. R. 4 Q. B. D. 228, it was held that one riding on a bicycle may be convicted of furiously driving a carriage upon a highway under a statute forbidding such an act. In commenting on this case Mr. Irving Browne says: "This of course would exclude bicycles from sidewalks, which is quite necessary." 24 Alb. L. J. 282.

If we are right in holding that the appellant, while riding his bicycle along the sidewalk, was engaged in the performance of an unlawful act, another important element is added to the appellee's case, making his right of recovery entirely clear, for a man who does an unlawful act is liable for the consequences, although they may not have been intended. *Peterson v. Haffner*, *supra*; *Hood v. State*, 56 Ind. 263; *Binford v. Johnston*, 82 Ind. 426; *Weick v. Lander*, 75 Ill. 93.

The appellant complains that testimony offered by him was erroneously excluded, but the evidence is not in the record, nor is there any statement that the rejected testimony was the only testimony that was given upon the subject. For anything that appears, the testimony may have been excluded because it was nothing more than a repetition of testimony already given by the witness. A party who seeks the reversal of a judgment must bring to this court a record affirmatively showing a material error, for, in the absence of such a showing, the presumption is in favor of the regularity of the rulings of the trial court. We do not mean to hold that where testimony is excluded it is always necessary to incor-

Rund v. Sprague.

porate all the evidence in the bill of exceptions; but we do hold, that where all the evidence is not incorporated in the bill, some statement must be made showing that it was excluded because deemed intrinsically incompetent. We should be glad to encourage a practice that will abbreviate the records, and we think that in many cases, where questions arise on instructions, or on rulings in admitting or excluding evidence, statements may be embodied in the bill of exceptions which will obviate the necessity of bringing all the evidence into the record.

Judgment affirmed.

Filed Feb. 23, 1889.

No. 13,535.

RUND v. SPRAGUE.

SUPREME COURT.—*Weight of Evidence.—Reversal of Judgment.—Practice.*—
A judgment will not be reversed upon the mere weight of the evidence.

From the Tippecanoe Circuit Court.

G. O. Behm and A. O. Behm, for appellant.

B. W. Langdon and T. F. Gaylord, for appellee.

OLDS, J.—This was an action brought by the appellee against the appellant to recover damages for the wrongful and unlawful detention of the real estate described in the complaint.

Answer of general denial; trial by the court, without the intervention of a jury, and finding and judgment for appellee for seventy-five dollars.

Isler v. Bland.

Motion for a new trial for the statutory causes questioning the sufficiency of the evidence to support the finding, which motion was overruled and exceptions reserved to the ruling of the court on the motion for a new trial, and this ruling is the only error assigned.

It is sufficient to say we have carefully examined the evidence in this case, and there is sufficient evidence to support the finding of the court. There is no error for which there should be a reversal of the judgment.

Judgment affirmed, with costs, and five per cent. damages.

Filed Feb. 23, 1889.

No. 13,514.

ISLER v. BLAND.

SUPREME COURT.—Preponderance of Evidence.—The Supreme Court will not weigh evidence for the purpose of determining the preponderance.

SAME.—Evidence.—Support of Verdict.—However much the evidence for the successful party may be contradicted, it will nevertheless, if it tends to support the verdict, be held sufficient on appeal, unless to believe it would involve an absurd or unreasonable conclusion.

SAME.—Motion for New Trial.—Exclusion of Evidence.—Where the exclusion of evidence is made a ground for a new trial, the particular evidence excluded must be designated and pointed out with reasonable certainty in the motion.

From the Miami Circuit Court.

S. D. Carpenter, R. P. Effinger and R. J. Loveland, for appellant.

L. Walker, W. B. McClintic and C. R. Pence, for appellee.

MITCHELL, J.—This was an action by Lottie Bland against

117	457
131	304
117	457
134	684
136	186
117	457
137	256
139	36
117	457
162	180

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Jonathan Isler, to recover the amount of a promissory note executed by the latter as maker to the former as payee.

Answers setting up want of consideration, payment, set-off, and the general denial, were pleaded, and after issue joined there was a trial by jury and a verdict for the plaintiff.

There is no question upon the pleadings in the case. The controversy here relates almost exclusively to the sufficiency of the evidence to sustain the verdict of the jury. After setting out the substance of the evidence given by the parties respectively, it is conceded that if the cause rested upon the testimony of the parties, the appellant must fail, because, having the burthen of the issue, and both being entitled to equal credit, there is no preponderance. In other words, it is conceded that the plaintiff's testimony, if believed, supports the verdict of the jury, but the erroneous assumption is indulged that this court will examine and weigh the evidence of all the witnesses, with a view of ascertaining upon which side it preponderates. It has often been held that this will not be done, and that where there is evidence in the record which tends to support the verdict, a reversal will not follow, even though the evidence, as a whole, seems to preponderate overwhelmingly against the conclusion of the jury. *Hammond & Co. v. Schweitzer*, 112 Ind. 246. In such a case, this court acts upon the presumption that there was something in the conduct or appearance of the witnesses, or other circumstances of the trial, which the opportunities of the jury and the judge at *nisi prius* enabled them to discover, and which could not be conveyed to this court, fully justifying the verdict, even though that was contrary to what might seem to be the weight of the evidence.

Where competent evidence appears in the record which, if true, tends to sustain the verdict and judgment, unless it is of such a character as that to believe it would involve an absurd or unreasonable conclusion, no matter how much the evidence is contradicted it will support the verdict nevertheless. *Continental Life Ins. Co. v. Yung*, 113 Ind. 159.

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What has been said disposes of the case, so far as questions involving the sufficiency of the evidence are concerned.

The fourth ground for a new trial is assigned as follows: "Error of law occurring at the trial of said cause, in that the court refused to permit the introduction of evidence explaining and accounting for the money of plaintiff that came into the hands of the defendant."

This assignment is too general to present any question. There can be no deviation from the well settled rule which requires that a motion for a new trial, in order to present any question, must point out with reasonable certainty the particular evidence objected to and excluded, and so designate it as to enable the court, without searching the whole record, to ascertain what evidence was offered and excluded to which the motion applies. *Harvey v. Huston*, 94 Ind. 527; *State, ex rel., v. Riggs*, 92 Ind. 336; *Northwestern M. L. Ins. Co. v. Hazelett*, 105 Ind. 212.

The motion in the present case does not even name the witness whose testimony in respect to the subject therein mentioned was excluded, nor does it indicate what question or questions were asked, or the evidence which the witness would have given in response.

There is no substantial merit in the point predicated upon the remarks of counsel for plaintiff in his closing argument to the jury. It does not appear that the intervention of the court was asked and refused, and that an exception was taken, nor can we see anything improper or prejudicial in the remarks in and of themselves.

The judgment is affirmed, with costs.

Filed Feb. 23, 1889.

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117	460
194	198

No. 13,413.

COLGLAZIER, ADMINISTRATOR, v. COLGLAZIER.

PLEADING.—*Motion to Strike Out.*—*Supreme Court.*—The overruling of a motion to strike out part of a pleading, or a paragraph of pleading, as surplusage, and for the reason that the same evidence may be given under another paragraph, does not constitute error for which a judgment will be reversed.

SAME.—*Answer.*—*Avoidance and Denial.*—A paragraph of answer may confess and avoid part of the allegations of the complaint and deny the others.

SAME.—*Trust.*—*Conversion.*—*Statute of Limitations.*—*Insufficient Answer.*—In an action against a trustee to compel an accounting and for judgment for trust funds converted, an answer setting up the statute of limitations in bar of the action and coupling with it a special denial of the defendant's trusteeship, in support of the plea of the statute, is bad.

From the Washington Circuit Court.

D. M. Alsbaugh, J. C. Lawler and T. Huston, for appellant.
S. B. Voyles and H. Morris, for appellee.

OLDS, J.—This action was brought by appellant as administrator of the estate of Abraham Colglazier, deceased, against the appellee.

The complaint alleged that in December, 1876, the decedent, reposing special trust and confidence in his son, the appellee, entrusted to him, as his agent and trustee, the care and custody of his property and the management of his business affairs; that the decedent was at that time nearly 88 years of age, had almost lost his sight and hearing and was, in a great degree, incapacitated for the transaction of business; that decedent then had notes and other personal property aggregating \$4,000; also a tract of land in Washington county of the value of \$6,500; that on the 8th day of January, 1877, appellee, as agent and trustee of decedent, sold at public auction personal property of decedent of the value of \$800; that on the 13th day of June, 1877, appellee purchased

of decedent, and received a deed from him for, said real estate for the consideration of \$6,500; that from December 1, 1876, appellee had control of the cash, notes, and all other property of the decedent, up to and until his death; that such cash, notes, personal property and purchase-price of said real estate amounted in the aggregate to \$11,000; that during the time appellee acted as such agent and trustee of decedent, the decedent resided at the house of appellee, as one of his family, and died there; that the appellee took advantage of the age and infirmities of the decedent, and of the confidence reposed in him by the decedent, and prevented the decedent from consulting with his other children and members of his family, and concealed and secreted his acts and doings as such agent and trustee from the other members of decedent's family, and failed to make or render an account of his acts and doings as such agent and trustee to decedent in his lifetime; that appellee, as such agent and trustee, collected all the notes and accounts of decedent except notes to the amount of \$1,350; that he converted the amounts so collected, and money so received, to his own use and benefit, amounting in the aggregate to \$10,000; that he transacted the business of the decedent in his own name, and mingled the funds so received and collected with his individual property, so appellant can not more particularly describe the transactions; that after the death of decedent, and appellant's appointment as administrator, he called upon the appellee and demanded the property left by decedent, and an accounting by appellee as such agent and trustee; that appellee delivered to him notes to the amount of \$1,350, twenty dollars in cash and a bed of the value of \$5, and refused to deliver to appellant any other cash, notes or property, or to render an account as such agent and trustee for any other property, and denied all knowledge of any other cash, notes or property. Prayer for judgment for \$10,000 and all proper relief.

To this complaint appellee filed an answer in three paragraphs.

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The first is a general denial. The second alleges that all money, notes and property of every name and kind mentioned in the complaint were paid for, settled and delivered to plaintiff's decedent, and to persons by him designated to receive the same, by defendant during said decedent's lifetime, in full accord with said decedent's wishes, and to his satisfaction in all things, as evidenced in writings duly executed by plaintiff's decedent in his lifetime, copies of which writings are filed with the paragraph, and made a part of the same, marked exhibits A and B. Then follows a denial of every other material allegation in the complaint not answered by the special allegation of fact stated in said paragraph. Exhibit A is a writing, dated March 4th, 1878, stating the amount decedent had given to each of his children, and following with a statement that "to make them equal I give to," naming a certain amount to each child. Exhibit B is a writing in the nature of a receipt, stating that appellee had made sale of decedent's property in January, 1877, and had accounted for the same, and receipts in full. Both writings were signed by the decedent.

Appellant first moved the court to strike this paragraph out, for the reason that the facts alleged therein amount to no more than the general denial, and that the same evidence could be given under the general denial as under this paragraph; he also moved to strike out the exhibits. The court overruled the motion. This ruling constitutes no error for which the judgment can be reversed.

The overruling of a motion to strike out a part of a pleading, or a paragraph of pleading, as surplusage, and for the reason that the same evidence may be given under another paragraph, does not constitute such error as will reverse a case. *Hutts v. Hutts*, 51 Ind. 581; *House v. McKinney*, 54 Ind. 240; *Brinkmeyer v. Helbling*, 57 Ind. 435; *Moore v. State, ex rel.*, 55 Ind. 360; *Lancaster v. Gould*, 46 Ind. 397; *Terre Haute, etc., R. R. Co. v. Graham*, 46 Ind. 239.

The appellant next filed a demurrer to the second para-

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graph of answer, which was overruled, and this ruling is assigned as error.

As we construe this paragraph of answer, it is in avoidance of so much of the cause of action as is based upon the proceeds of the sale of personal property sold at public auction in January, 1877, and a denial of all the other material facts stated in the complaint. True, the paragraph starts out as answering all the allegations of the complaint, by an accounting and by paying and delivering all the money and property received to decedent, and to persons by him designated to receive the same, but it avers that such accounting is evidenced by writings, signed by decedent, and made a part of the paragraph of answer, and thus the averments are limited to what is included in the writings, which is confined to the proceeds of the sale of personal property, and the denial covers all other material allegations of the complaint.

The paragraph of answer is part in avoidance and part in denial, pleading facts in avoidance of part of the causes of action sued upon, and denying the other facts stated in the complaint. While this paragraph of answer is not very artistically drawn, it is sufficient, and in harmony with our system of pleading. 1 Works Pr., section 589; *State, ex rel., v. St. Paul, etc., T. P. Co.*, 92 Ind. 42.

The third paragraph of answer pleads the six years' statute of limitation, and couples with it a denial of the allegations of the complaint that "have reference to defendant holding plaintiff's money in trust."

Appellant demurred to this paragraph for want of facts, which demurrer was overruled, and the ruling is assigned as error.

This action is brought against the appellee as trustee. It charges that appellee was acting in the capacity of agent and trustee of the decedent, and as such agent and trustee he received money, notes and property in trust for the decedent; that he used said trust funds so received as his own, intermingled the same with his individual moneys and property

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and converted it to his own use, and on demand failed and refused to render an account as such trustee. It is a suit against the appellee, alleging a trust and a breach of the trust by appellee, and if maintained it must be by proof of the existence of the trust and of the violation of it by appellee. There can not be a recovery on proof of an unlawful conversion without proof of the trust. The two actions differ materially. The action as brought in this case and stated in the complaint, being an action against a trustee to compel an accounting, and for judgment for the amount of trust funds converted, is of original equity jurisdiction, while the action for unlawful conversion is an action at law.

The third paragraph of answer is pleaded on the theory that the statute of limitation is a bar to any conversion that may have taken place by appellee. The general denial having been pleaded in the first paragraph, it put at issue all the material averments of the complaint, and the plaintiff could not recover, as we have said, except he prove the trust as alleged, and if the trust be proven, then the statute of limitation was no defence to the action. So that the statute of limitation is not a good answer to the complaint in this case.

There is a denial in the paragraph of answer, specially denying the allegations having reference to appellee holding plaintiff's money in trust, but it is evident from the paragraph that it was drafted upon the theory and for the purpose of pleading the statute of limitation as a good defence to the cause of action sued upon, and the words of denial were only coupled with the plea of limitation to bolster up said plea. It is a well settled rule of pleading that a paragraph of complaint or answer, if good at all, must be good on the theory upon which it is pleaded, and this paragraph can not be upheld as a special denial. The general denial having been pleaded in the first paragraph, there was no object or purpose of a denial of the facts constituting the trust in this paragraph, except, as we have said,

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to bolster up and make good the answer setting up the statute of limitation.

The theory upon which we hold this paragraph insufficient is supported by numerous decisions in our own State. *McBurnie v. Seaton*, 111 Ind. 56; *Lord v. Wilcox*, 99 Ind. 491; *Bumb v. Gard*, 107 Ind. 575; *Erwin v. Garner*, 108 Ind. 488; *First Nat'l Bank v. Root*, 107 Ind. 224; *Western Union Tel. Co. v. Young*, 93 Ind. 118; *Mescall v. Tully*, 91 Ind. 96; *Purcell v. English*, 86 Ind. 34.

The court erred in overruling the demurrer to the third paragraph of answer, for which error the judgment must be reversed.

The other questions presented may not arise on another trial of the case, hence we do not decide them.

Judgment reversed, at costs of appellee, with instructions to the court below to sustain the demurrer to the third paragraph of answer, and for further proceedings not inconsistent with this decision.

Filed March 8, 1889; petition for a rehearing overruled April 27, 1889.

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117	465
185	97

No. 14,556.

THE LAKE ERIE AND WESTERN RAILWAY COMPANY v.
MICHENER ET AL.

RAILROAD.—*Unlawful Entry Upon Land.—Injunction.*—Where a railroad company is about to enter upon and take permanent possession of land, without first having acquired the right to do so, and without making compensation, injunction may be maintained by the land-owner.

SAME.—*Right of Way.—Release.—Limitation of Width.*—Where a railroad company, by its charter, is authorized to acquire a right of way eighty feet wide, but accepts from a land-owner a release expressly limiting

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the right of way across his land to twenty-five feet, it can not thereafter, in the absence of a further grant, assert a claim to a greater width, unless it has acquired title by adverse occupancy, or unless it has entered upon the land and occupied it under such circumstances that the owner is estopped from reclaiming possession.

SAME.—*Estoppel*.—The fact that a land-owner gave permission to a railroad company to occupy, during his pleasure, certain ground adjacent to the right of way, with a turn-table and water-tank, does not estop him or his grantees, after the company has abandoned the ground so occupied, from asserting title when such company subsequently attempts to retake possession, not only of the parcel formerly occupied, but also of a strip of a defined width across the entire tract.

From the Howard Circuit Court.

W. E. Hackedorn and J. O'Brien, for appellant.

J. F. Elliott and L. J. Kirkpatrick, for appellees.

MITCHELL, J.—This proceeding was instituted by James B. Michener and others against the Lake Erie and Western Railway Company, to enjoin the company from entering upon a strip of land adjacent to its track, alleged to belong to the plaintiffs.

It was averred in the complaint that the railroad company's right of way constituted the west boundary of the plaintiff's land, and that the company was entering upon, making excavations, and laying tracks and switches from its railroad along and over the land owned by plaintiffs, without their consent, and without having taken any proceedings to condemn or otherwise to acquire the right to enter upon and appropriate their real estate.

It was also alleged that the defendant was threatening to continue the work to the permanent injury of the land, which injury could not be compensated in damages.

The general rule undoubtedly is, as appellant contends, that where a party has a clear and adequate remedy at law, he can not invoke the aid of a court of chancery, and ask relief by way of injunction, but a well established exception to the rule occurs when a railroad company enters upon the lands of another, without right, to lay its tracks. Upon seasonable

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application in such a case to a court of equity, an injunction will issue, upon the ground of necessity, in order to prevent irreparable injury. *Midland R. W. Co. v. Smith*, 113 Ind. 233, and cases cited; *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581, and cases cited; 2 Wood Railway Law, 794.

When it clearly appears that a railroad company threatens, or is about, to enter upon and take permanent possession of land, without first having in some way acquired the right to do so, and without making compensation, the right of the land-owner to an injunction must be considered as settled. High Injunctions, section 628.

The complaint under consideration makes a case within the rules above enunciated, and the demurrer to it was therefore properly overruled.

The facts as found by the court, and which seem to us to be sustained by the evidence, make it appear that the appellant railroad company owns and operates a line of railroad, under a special charter granted in January, 1846, to the Peru and Indianapolis Railroad Company.

The charter of the original company authorized it to acquire a right of way not to exceed eighty feet in width. The court found that the land in controversy was part of a quarter section formerly owned by David Foster, and that the latter had executed a written release of a right of way twenty-five feet in width across the tract to the railroad company, at the time the road was about to be constructed. In constructing its road the company graded its roadway to the width of twenty-two feet, and cut and removed the timber across the Foster tract, as well as all other lands over which its road was constructed, to the width of eighty feet.

The plaintiffs are now the owners of the land on the east side of the right of way of the railroad, claiming title by mesne conveyances through Foster, their deeds, and those of their grantors, describing their west boundary as being ten feet from the east rail of the railroad track.

The court found as a fact that a former owner of the land

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gave permission to the railroad company to erect a water-tank, part of which is eastward of a line ten feet east of the track. This was erected in 1862, and has remained and been used continuously ever since. Other structures, such as a turntable, engine-house, and the like, were erected eastwardly of the line described, with the permission of the landowner, but they have since been removed. It is found that permission was given to occupy the land as above without any consideration, and that the land was to be occupied, for the purposes mentioned, at the pleasure of the owner.

With the exception of the water-tank and pump, there does not seem to have been any permanent adverse occupancy of any ground by the railroad company to the east of the line described in the plaintiffs' conveyances as forming the west boundary of their land, for a period of twenty years; nor does it appear that any claim was ever asserted by the railroad company, except under the permission given as above mentioned, to any land eastwardly of a line ten feet east of the east rail of its track, except that it cut and removed the timber, as we have already seen, until in 1887, just prior to the commencement of this action, when it commenced laying a side-track or switch to the east, across and over the land.

Upon the facts found the court stated conclusions of law, to the effect that the railroad company was not entitled to occupy any of the ground east of the line already described, except so much as was already occupied and used by it in operating its water-tank and the wells thereon situate.

It is quite certain that if the release of the right of way executed by Foster to the railroad company had failed to specify any width, the contemporaneous entry upon the land, and the clearing and removing the timber from a strip eighty feet wide, would have been such an exposition of the meaning of the release as, *prima facie*, to establish the right of the company to a strip of ground of the width thus appropriated and occupied. *Prather v. Western Union Tel. Co.*, 89 Ind.

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501 ; *Indianapolis, etc., R. W. Co. v. Rayl*, 69 Ind. 424 ; *Indianapolis, etc., R. R. Co. v. Reynolds*, 116 Ind. 356.

As has been seen, however, the court, upon evidence which it deemed sufficient, found that the release expressly limited the right of way granted to the width of twenty-five feet. The right of the company to occupy to the width of eighty feet, if it has such right, must therefore be predicated either upon adverse occupancy for such a length of time as to confer title upon it, which no one contends for, or it must rest upon the doctrine of estoppel or acquiescence. Of course if the railroad company entered upon the land under a parol license from the owner, and expended money in the construction of buildings, or other conveniences for the conduct of its business, with the understanding that it was to have the right to use or occupy the ground permanently at its pleasure, it would now be too late to withdraw the license and enjoin the company from using the land. One person is not permitted to deny a state of things which his previous admission or silence induced another to believe existed, and upon which the other proceeded to act or expend money ; nor can a land-owner stand by until the construction of a railroad progresses so far that the public interest becomes involved and then arrest its further operation by appealing to the courts. *Louisville, etc., R. W. Co. v. Soltwedde*, 116 Ind. 257 ; *Morgan v. Railroad Co.*, 96 U. S. 716 ; *Midland R. W. Co. v. Smith, supra* ; *Indiana, etc., R. W. Co. v. Allen, supra*.

The facts found do not afford any basis upon which to rest an estoppel *in pais*.

It is quite true a former owner had given permission to the railroad company to occupy his land adjacent to the right of way with a turn-table and some other structures convenient for the company's use. But with the exceptions already mentioned, these had all been removed years before the Lake Erie and Western acquired the road, and the permission was to be at the pleasure of the owner. It can not be assumed that by consenting to the erection of the structures mentioned,

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for the purposes for which they were designed, the landowner thereby estopped himself and his grantees, after the company had abandoned the land, from asserting their right and title when the railroad company proposed again to appropriate not only the particular parcels formerly occupied, but in addition thereto a strip of a defined width across the entire tract.

There was no error. The judgment is affirmed with costs.

Filed Feb. 16, 1889; petition for a rehearing overruled April 25, 1889.

117	470
122	506
138	344
117	470
138	235

No. 13,394.

HUGHES ET AL. v. WHITE ET AL.

TRUST.—*Real Estate.—Guardian and Ward.*—Where a person purchases real estate, pays one-third of the purchase-money out of funds in his hands as guardian, gives his individual notes secured by mortgage for the balance, and takes the title in his own name, a trust results in favor of the purchaser's wards as to one-third of the real estate, and no more.

SAME.—*Change by Subsequent Transactions.*—A trust in real estate arises at the inception of the title, and depends upon the transaction as it occurred up to that time. It can not be changed by any subsequent transaction, except as such transaction may throw light upon the original.

From the Montgomery Circuit Court.

J. Wright and J. M. Seller, for appellants.

B. Crane and A. B. Anderson, for appellees.

OLDS, J.—The facts in this case are: John A. Hughes was appointed guardian of James and Laura B. Richey in 1883. Hughes gave bond as such guardian, with Frank L. Snyder, Martha F. Richey and John C. Maxwell as his sureties.

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Hughes, as such guardian, received trust funds belonging to his wards to the amount of \$2,727.86. In 1883, Hughes purchased a lot, the premises in controversy in this case, of John S. Brown and William C. White, and paid one-third of the price in cash out of his trust funds, and executed his two promissory notes for the balance, due in one and two years, secured by mortgage on the real estate so purchased. The deed was executed by Brown and White to Hughes, and the mortgage executed by Hughes to Brown and White on the same day. The notes were endorsed for full value by Brown and William C. White to Fannie C. White, before maturity, and she brings this suit to foreclose the mortgage. In May, 1883, Hughes began the improvement of the lot by erecting thereon two frame dwelling-houses, one on the north and the other on the south half, at a cost of about \$1,150 each. Hughes used about \$1,000 of his wards' funds in the buildings and fences on the lot, and in sidewalks and street assessments.

Appellants Stroh & Smith furnished Hughes \$814 worth of materials for use, and which were used, in the construction of the buildings, and filed a mechanic's lien to secure their claim, which was recorded in the miscellaneous record of the county.

On March 26th, 1884, John A. Hughes and wife executed a mortgage on the lot to Martha F. Richey and Frank L. Snyder to indemnify them as sureties on his bond as guardian.

On November 11th, 1884, Hughes and wife executed a mortgage on the lot to Stroh & Smith to secure the payment of a note given by Hughes to them for their claim for materials furnished and used in the houses erected on the lot, and Martha F. Richey and Snyder executed an agreement with Stroh & Smith, making the mortgage of Stroh & Smith prior to the mortgage of Richey and Snyder. Afterwards, in 1885, Hughes and wife, in consideration of the mortgage, and to indemnify Snyder and Richey, conveyed the lot to Snyder.

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Fannie C. White brought this action to foreclose her mortgage, making Hughes and wife, Stroh & Smith and others defendants.

Stroh & Smith filed a cross-complaint for the foreclosure of their mortgage.

James and Laura B. Richey, after being made parties on their own motion, filed a cross-complaint by their next friend, Martha F. Richey, claiming the entire interest in the real estate, and asking to have it adjudged that they were the owners of the lot. There was a special finding of facts, in substance as stated, and that the purchase-price of the lot was \$700, one-third of which Hughes paid out of the trust funds in his hands belonging to his wards, James and Laura B. Richey, and that Hughes was insolvent and had failed to account for the money in his hands belonging to said wards, and finding the amount due to the parties respectively. As conclusions of law it was stated that the amount due Fannie C. White, on her notes and mortgage, was a first lien on the lot, and that she was entitled to have a foreclosure of her mortgage against all of the parties; that the amount due Stroh & Smith was a lien on the undivided two-thirds of said lot, subject only to the lien of Fannie C. White, and they were entitled to a foreclosure of the same against all the parties to their cross-complaint; that James and Laura B. Richey were the owners in equity of, and entitled to a decree vesting in them the title to, the undivided one-third of said lot against all the parties to their cross-complaint, subject only to the payment of the amount due Fannie C. White, on her mortgage, and to a decree that said one-third owned by them should only be offered for sale in the event that said two-thirds did not sell for a sum sufficient to satisfy the amount due said White on the judgment of foreclosure in her favor, and that in case of the sale of such one-third, the surplus, if any, above paying said White debt, should be paid to James and Laura B. Richey; that the surplus from the sale of the two-thirds, after the payment of the judg-

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ments of Fannie C. White and Stroh & Smith, should go to Frank L. Snyder and Martha F. Richey as owners of said two-thirds.

Appellants excepted to the conclusions of law as stated by the court.

It is contended by the attorneys for the appellants, that as a part of the purchase-money paid by Hughes, the guardian of James and Laura B. Richey, for the real estate in question, was the money of said James and Laura B., a trust resulted in favor of them as to the whole lot, and that as Stroh and Smith had knowledge of the trust, therefore they derived no lien by reason of their mortgage. It is not contended but that the lot is liable to the lien for the purchase-money.

The case presented is, the guardian paid one-third of the purchase-money for the lot out of the funds of his wards, and gave his individual notes for the remaining two-thirds—the unpaid purchase-money—took the deed in his own name, and executed a mortgage on the said lot securing the notes given by him for the balance of the purchase-money. There was no agreement as to whom the title was to be made or who the purchase was in fact for.

We have the naked fact of the purchaser paying one-third the price with trust funds belonging to his wards, and he contracting to pay the remaining two-thirds. And it does not appear from the facts found but that the guardian was solvent and abundantly able to pay the amount for which he gave his notes at the date of the purchase.

There was never any part of the two-thirds for which Hughes gave his notes paid, nor was there ever any offer to pay the same, or any part, by either of the wards. The trust arises at the inception of the title, and must depend upon the transaction as it occurred up to that time, and it can not be changed by any subsequent transaction, except as such subsequent transaction may throw light upon the original. *Ap-*

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peal of Cross and Gault, 97 Pa. St. 471; *Midmer v. Midmer*, 26 N. J. Eq. 299.

For a trust to arise in favor of a person paying part of the purchase-money, the amount paid must be a definite aliquot part. If real estate is purchased with funds belonging to more than one person, and the title taken in the name of one, and each pays a certain specific sum and portion of the purchase-money, a trust will result in favor of the persons paying the purchase-money, and their interest in the real estate will be in proportion to the amount of the purchase-money paid. *Olcott v. Bynum*, 17 Wall. 44 (59); *Hidden v. Jordan*, 21 Cal. 92; *Botsford v. Burr*, 2 Johns. Ch. 405; *Bartlett v. Pickersgill*, 1 Eden, 515; *Sayre v. Townsends*, 15 Wend. 647; 1 Perry Trusts, sections 128, 133; *McGowan v. McGowan*, 14 Gray, 119; *Radcliff v. Radford*, 96 Ind. 482; *Derry v. Derry*, 98 Ind. 319; *Westerfield v. Kimmer*, 82 Ind. 365.

The one-third of the purchase-money having been paid with the money of James and Laura B. Richey, a trust resulted as to one-third of the real estate, and no more.

Counsel for appellant cite the case of *Mitchell v. Colglazier*, 106 Ind. 464, as sustaining the theory that the title to the whole lot vested in the wards, notwithstanding their money only paid one-third the purchase-price, and that the guardian gave his notes for the remainder.

In that case the wife furnished money to pay the full purchase-price; she was ignorant of the title being in her husband, or of his having given his notes for any part of the purchase-money. The agreement was that the purchase was to be made for her, and the deed taken in her name, and she did pay all the purchase-money as the notes fell due.

It is further urged by counsel, that, as the mortgage was given to Snyder and Martha F. Richey to indemnify them against loss, by reason of being security on the bond of Hughes as guardian of James and Laura B. Richey, the mortgage inured to the benefit of the wards, and they had an

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interest in the mortgage, and that Snyder and Martha F. Richey could not, by contract, make their interest in the mortgage lien subsequent and junior to the Stroh & Smith mortgage; that Stroh & Smith had knowledge of what the mortgage was given for, and of the interest of said James and Laura in the same; that the notice of the mechanic's lien is defective, and Stroh & Smith derived no rights under it, but took the mortgage, with full notice of the equities of James and Laura B. Richey, to secure an existing debt; that Laura B. and James Richey have the right to be subrogated to the interest of Snyder and Martha F. Richey in the mortgage, and as the land had been conveyed to Snyder, that he held it in trust for them. This question is not presented by the record; the pleadings make no such case as contended for by counsel in their brief. The cross-complaint proceeds upon the theory that, by reason of the investment of the funds of James and Laura B. Richey in the property, the equitable title was in them, and hence neither of the other parties took any interest in the real estate by virtue of their mortgages as against them, and the case was tried upon that theory, as appears from the record. There are some other exceptions taken and errors assigned, but as they are not discussed by counsel in their brief they are waived.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed Feb. 13, 1889; petition for a rehearing overruled April 27, 1889.

The State, *ex rel.* Price *et al.*, v. Hinsdale-Doyle Granite Company *et al.*

No. 13,639.

THE STATE, EX REL. PRICE ET AL., v. THE HINSDALE-
DOYLE GRANITE COMPANY ET AL.

BOND.—*Contractor for County Building.—Liability of Sureties.—Debts Incurred by Subcontractor.*—Sureties on a bond given under section 4246, R. S. 1881, by a contractor for the construction of a county building are not liable for debts incurred by a subcontractor.

From the Grant Circuit Court.

W. L. Lenfesty and J. L. Custer, for appellants.

H. Brownlee, for appellees.

BERKSHIRE, J.—This is a suit upon a bond executed pursuant to section 4246, R. S. 1881.

The only error assigned is error of the court in overruling the motion for a new trial.

There are three reasons stated in the motion :

1. The decision of the court is contrary to law.
2. The decision of the court is not supported by sufficient evidence.
3. The decision of the court is contrary to the evidence.

The facts, as we find them in the record, are about these: On the 14th day of July, 1880, the appellees executed the bond sued upon to secure the performance of a contract thereafter on the 17th day of the same month entered into by the Hinsdale-Doyle Granite Company with the board of commissioners of Grant county, State of Indiana, for the erection of a court-house; that after the execution of the contract, said company sublet a part of the work to one W. D. Richardson, who thereafter, and in the execution of his part of the work, contracted the indebtedness alleged in the complaint to be due to the relators; that the purchases were all made by the said Richardson and the credit given to him.

There is no stipulation in the bond that the obligors there-

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in shall respond to any liability incurred or indebtedness created by a subcontractor, nor is there anything in the statute extending the liability beyond the default of the contractor.

We can imagine no principle or theory whereby the appellees can be compelled to answer for the indebtedness alleged to be due to the relators. They have the right to stand upon the terms and conditions of their bond. We are not without authority to sustain the conclusion to which we have arrived. *Faurote v. State, ex rel.*, 110 Ind. 463, and *Faurote v. State, ex rel.*, 111 Ind. 73, are cases in point.

Those were suits brought on a bond given to secure the completion of a gravel road to recover for work and labor performed for and materials furnished to a subcontractor.

In those cases said section 4246 of the statutes was construed, and it was held that the liability on the bond did not extend to debts incurred by a subcontractor. See *McCluskey v. Cromwell*, 11 N. Y. 593.

The judgment is affirmed, with costs.

Filed March 6, 1889.

117	477
116	514
118	361
119	566
117	477
128	18

No. 14,313.

DURHAM v. THE STATE, EX REL. ANDERSON, PROSECUTING ATTORNEY.

TAXES.—*False List.*—*Omission of Property.*—*Penalty.*—One who fraudulently omits from the tax list returned by him money on deposit belonging to him, is liable to the pecuniary penalty prescribed by section 6339, R. S. 1881, which is recoverable in an action in the name of the State, on the relation of the prosecuting attorney.

SAME.—*Separate Offences.*—*Criminal and Civil Liability of Taxpayer.*—The

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offences defined by sections 2150 and 6339, R. S. 1881, in relation to false returns of property for taxation, are separate and distinct, the one subjecting the taxpayer to criminal prosecution, and the other rendering him liable to a penalty recoverable in a civil action.

SAME.—*Constitutional Law.*—The Constitution of this State, in speaking of criminal prosecutions, does not refer to the enforcement of statutory penalties.

From the Montgomery Circuit Court.

P. S. Kennedy and *S. C. Kennedy*, for appellant.

L. T. Michener, Attorney General, *A. B. Anderson*, Prosecuting Attorney, and *J. H. Gillett*, for the State.

ELLIOTT, J.—The relator's complaint, omitting the formal parts, reads thus: "That the defendant, William H. Durham, is now, and for ten years last past has been, a resident of Union township, Montgomery county, Indiana; that, on the 1st day of April, 1887, said defendant was the owner of a large sum of money, to wit, one hundred and thirty-six thousand two hundred and thirty-one dollars and fourteen cents, on deposit in the First National Bank of Crawfordsville, Indiana, subject to his order, check and draft, and which was subject to taxation under the laws of said State; that, on the 30th day of May, 1887, one George W. Benefield, who was then and there deputy assessor of Marion township of said county, appointed by Daniel H. Gilkey, the assessor of said township, and acting as such deputy, called upon said William H. Durham and furnished him with the proper blanks for the purpose of said Durham making to such deputy assessor a full and correct description of all the personal property of which the said Durham was the owner on said 1st day of April, 1887; that, on said 30th day of May, 1887, said Durham delivered to said Benefield, as such deputy assessor, a list and schedule purporting to be a full and correct list and description of all the personal property of which said Durham was the owner on the 1st day of April, 1887; that said list and schedule was not a true and correct list, schedule and statement of said Durham's money on de-

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posit, subject to his order, check and draft, but was a false and fraudulent list, schedule and statement, in this, to wit, that said list, schedule and statement, so delivered to said deputy assessor, did not contain said sum of money on deposit as aforesaid."

In *Burgh v. State, ex rel.*, 108 Ind. 132, the questions presented by this record were very fully discussed, and a conclusion reached that decides this appeal against the appellant. The same questions were presented in the case of *State, ex rel., v. Lauer*, 116 Ind. 162, and the rulings made in *Burgh v. State, ex rel., supra*, were approved and followed. We do not deem it necessary to again discuss the question, for we are satisfied that the reasoning in *Burgh v. State, ex rel., supra*, demonstrates the validity of the conclusions there announced, and to them we adhere.

There is no difference in principle between this case and the former cases, for here the complaint charges that the defendant delivered to the assessor a false and fraudulent list, and the particular in which it was false and fraudulent is specified.

The demurrer concedes that the list was a false and fraudulent one, and the case, therefore, comes within the provisions of section 6339, R. S. 1881.

The requirement of the statute is that the taxpayer shall give a true list, and, as it reads, in substance, if he "shall give a false or fraudulent schedule or statement," he shall be "liable to a penalty of not less than fifty dollars nor more than five thousand dollars."

It is perfectly obvious that a list which fraudulently omits an item of property is such an one as the statute condemns; and it is also clear that the statute intends that a person guilty of returning such a list shall pay the penalty prescribed. The object of the statute is two-fold: 1st. To reimburse, in some measure, the government for the loss and inconvenience caused by the effort to secrete property. 2d. To punish the offender. The penalty is not simply a fine.

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We have no doubt that we were right in holding, as we did in *Burgh v. State, ex rel., supra*, that the offence defined in section 6339 is different from that defined in section 2150. It is, as is well known, the duty of the courts, when it can be done, to so construe statutes relating to the same subject as that they shall all stand, and, standing, shall form one consistent body of law. This duty we here discharge when we hold that the two sections mentioned shall both stand, and that the offences defined by them respectively are separate and distinct.

We concur with appellant's counsel that the law will not twice punish the same act, but we can not agree that the acts denounced in sections 6339 and 2150 are the same.

Penalties, although prescribed for a public wrong, may be recovered on a complaint in the name of the State, or in the name of a party authorized by law to sue. The Legislature has plenary power to prescribe the form of remedy. The Constitution does not require that actions to recover statutory penalties shall be prosecuted by indictment or information. At common law debt was the appropriate form of action. *Western U. Tel. Co. v. Scircle*, 103 Ind. 227; *United States v. Hoskins*, 5 Mackey (D. C.), 478.

Mr. Bishop thus states the law: "The doctrine is different where a penalty is to be recovered in a proceeding civil in form,—as, for instance, in a *qui tam* action,—though the thing done is in its nature criminal. Here the law does not regard the act as being properly a crime; or, if it does, still the rules which regulate civil proceedings must be applied." 1 Bishop Cr. Law, section 956.

Constitutions are to be interpreted "in the light and by the assistance of the common law." In judging what a Constitution means, we are to keep in mind that it is not the beginning of the law for the State, but that it assumes the existence of a well understood system, which is still to remain in force and be administered. Cooley Const. Lim. (4th ed.), 70.

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Applying this familiar doctrine, the conclusion must be that our Constitution, in speaking of criminal prosecutions, does not refer to the enforcement of statutory penalties.

It is assumed by counsel that appellant has been prosecuted by indictment for the same wrong as that described in this complaint, but there is nothing in the record justifying this assumption; on the contrary, we must assume, as matter of law, that he could not have been successfully prosecuted, because the statute which defines the wrong declares that the penalty shall be a pecuniary one, recoverable in an action prosecuted in the name of the State on the relation of the prosecuting attorney.

The Legislature, in the due exercise of its power, has defined the wrong, declared it actionable, prescribed the penalty, and provided the remedy. The complaint states facts constituting the wrong denounced by the statute, the remedy is appropriate, and the parties are the proper ones, so that the case is brought fully within the statute.

Judgment affirmed.

Filed Jan. 5, 1889; petition for a rehearing overruled March 5, 1889.

No. 12,325.

CHAPELL ET AL. v. SHUEE ET AL.

JURISDICTION.—*Circuit Court.*—*Pleading.*—*Complaint.*—As the circuit court is a court of general and superior jurisdiction, its authority to proceed in the trial of a cause need not affirmatively appear in the complaint.

DECEDENTS' ESTATES.—*Partial Distribution.*—*Petition for.*—*Jurisdictional Facts.*—A petition in the circuit court, by an administrator and heirs, asking the ascertainment of advancements and an order for partial dis-

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117	481
120	90
120	430
123	157
117	481
124	324
127	408
117	481
120	481
120	505
117	481
120	180
117	481
142	661
143	235
117	481
151	584

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tribution of funds in his hands, is not bad because it is silent upon the subject of the decedent's domicile, the issuing of letters of administration, the location of property, or other jurisdictional facts; but the facts showing want of jurisdiction in the court to act upon the petition must be brought forward by answer.

SAME.—Ascertainment of Advancements.—Under the provisions of the statute (Acts of 1883, p. 158, section 18, and section 2380, R. S. 1881) the circuit court may, in its discretion, upon a proper petition, at any time previous to the settlement of an estate, allow a partial distribution to heirs of moneys in the hands of the executor or administrator; and in such proceeding it has jurisdiction to ascertain the amount of advancements made by the decedent.

SAME.—Bond.—Failure of Court to Require.—The failure of the court to require the heirs to give bond, as required by section 2380, R. S. 1881, for the return of the money distributed, in case it is needed to pay debts, is an informality which will not, in the absence of any seasonable objection, invalidate the judgment as to the parties in court.

PLEADING.—Complaint.—Defects Curable by Proof.—Motion in Arrest of Judgment.—A complaint will withstand a motion in arrest of judgment if it is sufficient to bar another action for the same cause and if the defects therein are such as may be supplied by proof.

From the Tippecanoe Circuit Court.

W. C. Wilson, J. H. Adams, G. O. Behm, A. O. Behm and W. H. Bryan, for appellants.

J. R. Coffroth, T. A. Stuart, C. E. Lake and J. S. McMullen, for appellees.

OLDS, J.—This action was commenced by the appellees in the Tippecanoe Circuit Court. There was no demurrer addressed to the complaint, and an answer of general denial was filed. The cause was tried, resulting in a finding for the appellees. A motion for a new trial was made, for reasons stated in the motion, which was overruled and exceptions reserved by appellants. The appellants then made a motion in arrest of judgment, which was overruled, to which ruling they also excepted.

The first question presented is as to the sufficiency of the complaint. Omitting the caption the complaint is as follows: "The undersigned, William D. Shuee and Amanda A. Shuee, respectfully represent to the court that said William D. is

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the administrator of the estate of David Shuee, deceased, and that said William D., Amanda A. and one Josephine Chapell are the only children of said David, who died intestate; that one Susan Shuee is the widow of said David, she being his childless second wife; that subsequent to the death of said David the said Susan sold, assigned and conveyed all her interest in said estate to said William D., Amanda A. and Josephine; that subsequent to the execution of said contract said Susan recovered a judgment of rescission of said contract in the Tippecanoe Circuit Court against said William D., Amanda A. and Josephine, who were defendants therein; that said defendants have appealed from said judgment to the Supreme Court of Indiana, and that said cause is now pending therein: that said Susan claims to be, and by the decree of said court is, entitled to one-third part of said estate, less a payment thereon of fifteen hundred dollars; that the claim of said Susan is wholly disputed and denied by said administrator and the said children of said David; that with the exception of said claim of said Susan, no one is interested in the distribution of said estate except the said William D., Amanda A. and Josephine; that said administrator has collected, and has now on hands, of funds belonging to said estate the sum of \$16,859.79, and there is still due the estate about — thousand dollars of notes, which are solvent and which are drawing good rates of interest; that no claims have been filed against said estate; that there are no claims against it, and that the same is clearly solvent; that said administrator and said children are desirous of making distribution of so much of said sum as may be uncontested, leaving in the hands of said administrator the full amount thereof to which Susan might be entitled upon the affirmance of said judgment.

“They further show that prior to the death of said David he caused to be conveyed to said William D. Shuee certain real estate in said county, of the value of four thousand and five hundred dollars; that at the same time the said David conveyed to said Amanda A. certain real estate in said county,

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of the value of four thousand and five hundred dollars ; and at the same time said David conveyed to said Josephine, by way of advancement, certain real estate in said county, of the value of fifteen hundred dollars ; that said Josephine disputes the value of said advancement so set forth.

“ Wherefore your petitioners pray that the value of advancements so made by the said David Shuee in his lifetime may be ascertained and determined by this court, and that two-thirds of the amount of the money now in the hands of said administrator may be distributed among the said children as their interests may appear, and that the remainder thereof be left in the hands of said administrator, subject to the final determination of said cause now pending in the Supreme Court, and that said Josephine be notified of the pendency of this petition and be required to defend the same ; or if the question of advancements can not be settled in this petition, then the said William D., in his own right, and the said Amanda A. pray the court to allow them to receive the sum of \$3,500 each, to be applied upon their respective shares of said estate.”

It is contended by counsel for appellants that the complaint is insufficient, for the reason that the distribution of the personal estate of an intestate is governed by the law of the country of his domicile at the time of his death, and therefore the surplus of the estate of David Shuee should be distributed according to the law of his domicile at the time of his death ; that it does not appear from the complaint that the deceased had a domicile in or was an inhabitant of the State of Indiana at the time of his death ; that there is no averment in the complaint as to the time or place of the death of David Shuee ; that it is not averred that letters of administration were issued by the Tippecanoe Circuit Court or any other circuit court of this State, or that David Shuee died possessed of any property situate in Tippecanoe county or in the State of Indiana ; that such averments are necessary both to give the court jurisdiction and as substantive facts to

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make out a cause of action. As we have heretofore stated, the complaint was not tested by a demurrer, and hence the question is as to whether it is sufficient to withstand a motion in arrest of judgment.

It has been repeatedly held by this court, that, the circuit court being a court of general and superior jurisdiction, its authority to proceed in the trial of a cause need not affirmatively appear in the complaint. *Brownfield v. Weicht*, 9 Ind. 394; *Ragan v. Haynes*, 10 Ind. 348; *Godfrey v. Godfrey*, 17 Ind. 6; *Board, etc., v. Markle*, 46 Ind. 96 (106); *Houk v. Barthold*, 73 Ind. 21; *Wilcox v. Moudy*, 82 Ind. 219; *Brown v. Anderson*, 90 Ind. 93.

In the recent case of *Bass Foundry and Machine Works v. Board, etc.*, 115 Ind. 234, objection was made to the complaint on the grounds that it did not show that the claim sued upon had been first presented to the board of commissioners for allowance, and there a demurrer was filed for the cause that the court did not have jurisdiction. The court says: "The rule is universal as applied to courts of general jurisdiction, and especially in matters which proceed according to the course of the common law, that the facts which give the court jurisdiction of the subject of the action need not affirmatively appear on the face of the complaint," citing *Kinnaman v. Kinnaman*, 71 Ind. 417, 1 Works Pr., section 474, and then adding: "It follows from the very language of the statute which prescribes the causes of demurrer, as well as from the general rules of the common law, that a demurrer for want of jurisdiction, either in respect to the person of the defendant or of the subject-matter of the action, will only lie when the defect appears upon the face of the complaint. The difference between want of jurisdiction because the court is wholly without power or authority to take cognizance of and adjudicate upon the particular subject-matter involved in the suit, and want of jurisdiction on account of the non-existence of some extraneous fact which may or may not exist in that case, is not to be disregarded.

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Where the court is, in law, incompetent, and without the faculty to deal with the subject-matter before it, its proceedings and judgment, without regard to any question of waiver or consent by the parties, would be *coram non judice*. In such a case the want of jurisdiction would necessarily appear upon the face of the complaint, and objection might be taken by demurrer or motion to dismiss. Where, however, the subject-matter before the court is within its ordinary jurisdiction, so that its judgment would be binding unless the facts going to defeat its jurisdiction in that particular case were brought forward, a court of general jurisdiction may proceed until the facts showing want of jurisdiction are made affirmatively to appear. This is so because the parties may, in such a case, waive any question concerning the jurisdiction of the court. Where facts exist which would deprive the court of jurisdiction, or arrest the proceedings for the time being, the complaint being silent in that regard, objection can not be taken by demurrer, but the facts must be brought forward by answer or plea."

It is conceded, and must be so if it were not conceded, that if the intestate was an inhabitant of Tippecanoe county, and owned property situated in said county at the time of his death, and letters of administration issued from the Tippecanoe Circuit Court, the court had jurisdiction. The complaint is silent as regards these facts, and if they did not exist, if David Shuee was, at the time of his death, a resident of another State, and left no property in Tippecanoe county, and letters of administration were not issued by said court, these were facts which should have been brought before the court by an answer, and not being so brought before the court, they are waived, so far as questioning the jurisdiction of the court is concerned.

As regards the necessity of pleading these facts, in connection with the other facts alleged, in order to make a good cause of action, they are such facts as might be supplied by proof, and the complaint is sufficient to bar another action for the

same thing, which is all that is necessary to make a complaint sufficient to withstand a motion in arrest of judgment. *Reid v. Mitchell*, 95 Ind. 397; *Hedrick v. Osborne & Co.*, 99 Ind. 144; *Jackson v. Weaver*, 98 Ind. 307; *Watson v. Crow-sore*, 93 Ind. 220; *Louisville, etc., R. W. Co. v. Harrington*, 92 Ind. 457; *Hoke v. Applegate*, 92 Ind. 570; *Ferguson v. State, ex rel.*, 90 Ind. 38.

It is further urged that the complaint is not good for the reason that it appears therefrom that the administrator has in his hands uncollected assets; that the debts are not paid; that there is unsettled litigation pending; that the deceased, in his lifetime, made advancements, and asked for an equalization of the advancements. That under our statutes there can be no distribution and equalizing of advancements until final settlement is made, and that such final settlement can not be made for one year after letters issue, and that the complaint does not show that one year has expired.

The act of 1883 (Acts of 1883, p. 158, section 18), amends section 2379, R. S. 1881, so as to read: "Any person entitled to any legacy, or to a distributive share of the estate of any deceased person, may at any time previous to the settlement of such estate, apply to the court, either in person or by guardian, after giving reasonable notice to the executor or administrator, to be allowed to receive a portion of such legacy or distributive share."

Section 2380, R. S. 1881, reads as follows: "If it appear to the court that there be at least one-third more of assets in the hands of such executor or administrator or in court than will be sufficient to pay all debts and legacies against the estate then known, such court may, in its discretion, allow such portion of such legacy or distributive share to be advanced as it may deem proper, upon satisfactory bond being executed to such executor or administrator, with sufficient penalty and surety for the return of any portion with interest, whenever necessary for the payment of debts, legacies, or

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claims, or to equalize the shares and legacies among those entitled thereto."

Under these sections this was a proper proceeding for an order that the administrator pay to these heirs a portion of their distributive share of said estate. The court having jurisdiction for that purpose, acquired it for all purposes necessary to a full determination of the case. *Feder v. Field, ante*, p. 386. To intelligently exercise the discretion vested in the court in making an order to pay to the heir a portion of his distributive share, it was necessary to ascertain the amount due such heir, which, if there had been any advancements made, could only be done by ascertaining and fixing the amount of such advancements.

The giving of the bond required is a duty resting on the court making the order. The court should have ordered that a bond be given by the heirs, as required by the statute, but the omission to do so is an informality in the order, and the parties, being in court, were required to object to the form of the order and judgment rendered, and save the question by proper bill of exceptions. This the appellants have failed to do, and they can not for the first time raise such question in this court.

The further question presented and discussed by counsel in their brief is as to the sufficiency of the evidence to sustain the finding and judgment of the court. The evidence fairly supports the finding and judgment, and we can not disturb them.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed March 5, 1889.

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No. 14,569.

THE SUPREME LODGE, KNIGHTS OF PYTHIAS, v. KNIGHT.

BENEFIT SOCIETY.—Contingent Liability.—Payment out of Specific Fund.—

Where a benefit certificate issued by a benevolent order contains an agreement to pay the beneficiary two thousand dollars, with a proviso that if there shall be less than two thousand members in the class to which the assured belongs, then only a sum equal to one dollar for each member shall be paid, the amount recoverable by the beneficiary is contingent upon the number of members in the class, and is confined to the specific fund.

SAME.—Number of Persons in Class.—Burden of Showing.—In an action upon the certificate the beneficiary need not allege in the complaint that at the time the assured died there were two thousand members of the particular class, but if there were less than that number the burden is upon the defendant to show the fact.

SAME.—Charter and By-Laws.—Constitution Merely a By-Law.—The constitution adopted by a voluntary association or a corporation is not a charter, but only a by-law under an inappropriate name, and the association or corporation can alter or abrogate it, unless prohibited by some higher rule; hence a conflict between constitution and by-law is merely a conflict between by-laws.

SAME.—Contract of Insurance.—Elements of.—The provisions of the charter and established by-laws of a benefit association are elements of contracts of insurance between the association and its members.

SAME.—Vested Right.—While both the assured and the beneficiary have a right which is in its nature a vested one, it is not an unqualified vested right, but is subject to the limitations and conditions of the charter and by-laws, which are factors of the contract.

SAME.—Notice of By-Laws.—Amendment.—A member of a benefit association must take notice of all by-laws which affect his rights or interests, and where there is an express reservation of the right to amend he is bound to take notice of the existence and effect of such reserved power.

SAME.—Power to Enact By-Laws.—Discretion.—Judicial Interference.—The power to enact by-laws is an inherent and continuous one; the duly authorized representatives of the members are alone vested with the power of determining when a change is demanded, and the courts will interfere only when there is an abuse of discretion.

SAME.—Depletion of Class.—Liability of Society.—A change by a benevolent order, in good faith, under a reserved power of amendment, of its system of insurance, whereby the number of persons in a certain class is re-

117	489
118	57
118	300
122	460
122	570
117	489
126	53
117	489
141	423
117	489
164	281
117	489
171	538

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duced by the creation of another class giving insurance upon more favorable terms to persons under a certain age, and permitting certificate holders to become members of the new class, thus cutting down the amount which will be realized by a beneficiary by an assessment upon the members of the old class, is not such a wrongful act or breach of contract as renders the association liable to the beneficiary beyond the amount which will be so realized; but even if the depletion of the class mentioned constituted a breach of contract, the damages are too remote and conjectural to form the basis of a recovery.

From the Clay Circuit Court.

S. P. Oyler, W. A. Johnson, E. S. Holliday and G. A. Byrd,
for appellant.

D. E. Williamson, A. Daggy, G. A. Knight and A. W. Knight, for appellee.

ELLIOTT, C. J.—The first paragraph of the appellee's complaint counts upon a certificate of insurance taken out in the order of the Knights of Pythias, and naming the appellee as the beneficiary. The certificate contains an agreement to pay the appellee the sum of two thousand dollars upon the death of the assured, but this agreement is subject to the condition thus expressed: "*Provided, however, That if, at the time of the death of said Brother Edward S. Hussey, there shall be less than two thousand members in this class, there shall only be paid a sum equal to one dollar for each member in good standing in this class.*"

The effect of this stipulation is to confine the beneficiary to a specific fund. This fund is such as is yielded by the assessments laid upon the members of the class of which the assured was a member. There is no general, unconditional agreement to pay two thousand dollars, for the amount the order undertakes to pay is contingent upon the number of the members of the class to which the assured belonged. The contract is not the less one of insurance because made by a voluntary association or benevolent order, for the consideration was a valuable one, and was yielded in return for the agreement of the order to pay the beneficiary the desig-

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nated sum upon the death of the assured, but, nevertheless, it is not a general contract to pay a stipulated sum unconditionally. *Presbyterian Mutual Assurance Fund v. Allen*, 106 Ind. 593.

The policy only entitled the beneficiary to a sum equal to one dollar for each member of the class at the time of the death of the assured, but it does not follow from this that the beneficiary was bound to aver that there were two thousand members of the class at the time the assured died. The number of members was a matter peculiarly within the knowledge of the defendant, and the plaintiff was not bound to allege facts peculiarly known to it, and of which she could have little, if any, knowledge. *Elkhart Mutual Aid, etc., Ass'n v. Houghton*, 103 Ind. 286; *Lueder v. Hartford, etc., Ins. Co.*, 12 Fed. Rep. 465; *Supreme Council v. Anderson*, 61 Texas, 296.

The plaintiff, in such an action as this, makes a *prima facie* case, entitling him to recover the sum named in his certificate, when he pleads the certificate, performance on his part and that of the assured, death of the assured, and failure of performance on the part of the insurer.

The third paragraph of the complaint presents a radically different question from that presented by the first, for it proceeds upon the theory that the governing body of the order, by establishing a new class, and offering more advantageous terms to members of the order who would enter it, so depleted the class to which the assured belonged as to reduce the value of the certificate to one hundred and seventy-three dollars, and that, for this reason the appellee is entitled to recover the difference between the value of the policy represented by the members that remained in the class and the maximum sum named in the certificate.

The paragraph under immediate mention alleges that the defendant is a foreign corporation, organized for benevolent purposes; that it established an endowment rank for the purpose of securing benefits to the members, and that in the year

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1877 the endowment rank consisted of two classes, the first and the second; that at that time there was in force these provisions of the constitution of the corporation: "No person shall be eligible for membership in this rank unless he be a Knight of Pythias, in good standing in his lodge, and not over fifty years of age, provided that, until June 1st, 1878, all members of the Knights of Pythias may become members of the endowment rank, without regard to age; that when there are less than two thousand members in the second class, the benefit accruing therefrom shall be one dollar from each and every member thereof;" that, in the month of October, 1877, the father of the plaintiff became a member of the order, and of the second class of the endowment rank, as it then existed; that he received a certificate in which the plaintiff was designated as the beneficiary; that, at the time the plaintiff's father became a member, the provisions of the constitution quoted were in force, and the order possessed the right and the power to raise the sum named in the certificate by an assessment upon the members of the second class of the endowment rank; that within six months after the endowment rank was established the second class contained more than two thousand members, and that the members increased until they finally reached sixteen thousand; that, in May, 1884, at a session of its Supreme Lodge, the order changed its constitution and by-laws so that a fourth, or graded, class was created; that this was done without the knowledge or consent of the insured and the plaintiff; that, because of this change, and through the extraordinary efforts and inducements of the order, members of the second class under the age of sixty years were induced to leave the second class and enter the fourth; that, in that class, the members were required to pay a definite sum upon each one thousand dollars of insurance, based upon the American tables of life expectancy, instead of one dollar for each death; that the officers of the order represented to the members of the classes first established, who were under sixty years of age,

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that premiums would be less burdensome in the fourth class than the death rate under the assessment plan, and they were, and are, less burdensome to persons under that age ; that the constitution and by-laws, as amended, allowed members one year's time in which to change from the first established classes to the fourth, or graded, class ; that the year thus fixed expired in May, 1885 ; that, for the purpose of still further depleting the old classes, the time was extended until the 24th day of October, 1885, and it was ordered that no transfer to the fourth class should be permitted after that date ; that neither the assured nor the plaintiff had any notice of the change until November, 1886 ; that immediately upon receiving notice of the change they notified the defendant that they protested against it ; that by reason of the change the class to which the assured belonged was reduced to one hundred and seventy-three members ; that the plan framed by the change largely increased the cost of insurance to persons over sixty years of age ; that the act of the order in making the change was in violation of its constitution ; that all assessments have been paid since the time the certificate of membership was issued, in November, 1877 ; that the plaintiff has paid, in addition to assessments, the sum of two dollars each year for nine years, and that the total amount paid by her is two hundred and forty dollars. The complaint also contains the proper allegations as to the death of the assured and the filing of the necessary proofs. The certificate incorporated in this paragraph contains, among others, the provisions which we have quoted.

The third paragraph of the appellant's answer is addressed to the paragraph of the complaint of which we have given a synopsis, and its contents may be thus summarized : It admits the allegations of the complaint as to the contract, the payment of assessments and the like, avers that there were only one hundred and seventy-three members of the class to which the assured belonged, and admits that the sum of one hundred and seventy-three dollars is due the plaintiff. It avers

that the constitution and by-laws were changed by the representatives of the members of the order so as to create a fourth, or graded, class, and that these amendments were made at a regular session of the governing body of the fraternity. It sets forth at length the constitution and by-laws of the order, and in them the general plan of the order is exhibited, its objects set forth and the relations of the members to the order shown, and in them also is contained a reservation of the right and power to change or amend the constitution and by-laws of the association. It alleges that the amendments were made in conformity to the constitution and by-laws, and in good faith, and for the best interests of the order. It also appears that the system of insurance was changed by the amendments made in May, 1884, from the arbitrary assessment plan to that of the payment of premiums, graduated according to the age of the members.

The appellee's counsel have constructed a very ingenious and plausible theory, but it is not strong enough to bear the test of the law. The assumption upon which it rests is, that the appellant has invaded a legal right of the appellee, and as this assumption can not be made good, the theory must fall. An invasion of a legal right constitutes an actionable wrong. But there can be no actionable wrong unless there is a breach of contract or a tortious act. Nor is it in every case where there is a wrong that actual damages can be recovered, since damages that are purely speculative or conjectural are not recoverable. There must also be some connection between the act complained of and the injury alleged as the resulting one. These familiar principles constitute the groundwork of our discussion.

In such a case as the present, the only wrong that could give the claim of the plaintiff the complexion of a tort would be one in its nature fraudulent, for, without some element of fraud, such a claim as that here urged must be ranked as a claim belonging to the class *ex contractu*, and not to the class *ex delicto*. It is quite clear that there was nothing of a fraud-

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ulent or dishonest nature in the act of the appellant. There was neither actual nor constructive fraud. The change in the by-laws was made in conformity to the original laws of the order; there was no bad faith; there was, on the contrary, a purpose to advance the interests of the order, and the means chosen to effect that purpose were not founded on a mere arbitrary exercise of power, for very substantial and very good reasons support the action of the order in changing the system of insurance. All things indicate good faith and an honest purpose. But if this were not so, the presumption of good faith rises to do the appellant service.

If, therefore, the appellee has a valid claim for more than the amount of one hundred and seventy-three dollars, it must rest upon an actionable breach of contract, and not upon a tortious act. The only plausible portion of the appellee's argument is that which rests upon the assumption that there was a breach of contract, and unless this assumption is maintainable the ground falls away from her position.

There is a fallacy pervading the appellee's argument which it is well enough to notice before going directly to the question of whether there was an actionable breach of contract. The fallacy to which we refer is the assumption that the constitution of the order is its charter. This is an error. Charters are not created by the act of the corporation or association, but are granted by the sovereign power of the State. A constitution of a voluntary association or a corporation is nothing more than a by-law under an inappropriate name. The power that can enact a by-law, whether called a constitution or not, can alter or abrogate it, unless some higher rule restrains or prohibits a change or repeal. When the authorities speak of a charter they mean an essentially different thing from a law or constitution of the association's own creation. The change in the by-laws of the association can not, therefore, be held to have been made in violation of its charter, hence the appellee's counsel are in error in asserting that there is a conflict between the amended

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by-laws and the charter. The by-laws, are before us, but the charter is not, for it is not pleaded. What counsel call a charter is nothing more than a code of laws, established, not by the sovereign power of the government, but by the creature of that power, the corporation or association. The most that can be justly said is, that the later by-laws are in conflict with the earlier. There is, therefore, no clashing between corporate utterances and charter provisions. Authorities and arguments based upon the hypothesis that the later by-laws contravene the provisions of the corporate charter are entirely without force or relevancy.

The provisions of the established by-laws of an association such as that with which the assured united, are, as appellee's counsel justly affirm, elements of the contract of insurance. They are factors that can not be disregarded. That they have this effect all who become members of the association must know. A person who enters an association must acquaint himself with its laws, for they contribute to the admeasurement of his rights, his duties and his liabilities. *Bauer v. Samson Lodge*, 102 Ind. 262; *Fugure v. Mutual Society, etc.*, 46 Vt. 362; *Simeral v. Dubuque M. F. Ins. Co.*, 18 Iowa, 319; *Coles v. Iowa, etc., Ins. Co.*, 18 Iowa, 425; *Coleman v. Knights of Honor*, 18 Mo. App. 189; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Penn. St. 402; *Burton v. St. George's Society*, 28 Mich. 261; *Osceola Tribe v. Schmidt*, 57 Md. 98; *Sperry's Appeal*, 116 Pa. St. 391; *Bacon Benefit Societies*, section 81. It is not one by-law or some by-laws of which the member must take notice, for he must take notice of all which affect his rights or interests. *Poultney v. Bachman*, 31 Hun, 49. Where, as here, there is an express and clear reservation of the right to amend he is bound to take notice of the existence and effect of that reserved power.

The power to enact by-laws is inherent in every corporation as an incident of its existence. This power is a continuous one. *Niblack Mut. Ben. Soc.*, section 124. No one

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has a right to presume that by-laws will remain unchanged. Associations and corporations have a right to change their by-laws when the welfare of the corporation or association requires it, and it is not forbidden by the organic law. The power which enacts may alter or repeal. *Richardson v. Society*, 58 N. H. 187; *Commonwealth v. Mayor*, 5 Watts, 152; *St Patrick's Society v. McVey*, 92 Pa. St. 510.

The duly chosen and authorized representatives of the members alone are vested with the power of determining when a change is demanded, and with their discretion courts can not interfere. Were it otherwise, courts would control all benevolent associations, all corporations, and all fraternities. It is only when there is an abuse of discretion and a clear, unreasonable and arbitrary invasion of private rights that courts will assume jurisdiction over such societies or corporations. With questions of policy, doctrine, or discipline, courts will not interfere. Courts will compel adherence to the charter and to the purpose for which the society was organized, but they will not do more. *Stadler v. District Grand Lodge, etc.*, 3 Am. Law Rec. 589; *Crossman v. Massachusetts Ben. Ass'n*, 143 Mass. 435; *Hussey v. Gallagher*, 61 Ga. 86.

The principle which rules here is strictly analogous to those which prevail in controversies between the officers and members of religious organizations, and it is well settled that, in such cases, courts will not control the exercise of discretionary powers, or direct the course of action in matters of expediency or polity. *Dwenger v. Geary*, 113 Ind. 106.

To justify interference by the courts and warrant the overthrow of by-laws enacted in the mode prescribed by the by-laws, it must be shown that there was an abuse of power, or that the later by-law is unreasonable. It is not enough to show that a better or wiser course might have been pursued, for it must be shown that there was an abuse of discretion, or that the by-law is so unreasonable as to be void. We do not affirm that a benefit society may, by a change in

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its by-laws, arbitrarily repudiate an obligation created by a policy of insurance, but we do affirm that, where a change is regularly made in its by-laws, and the motive which influences the change is an honest one to promote the welfare of the society, and the members are all given an opportunity to avail themselves of the change, no actionable wrong is done the members or their beneficiaries. It may sometimes happen that the interests of one individual, or of a few individuals, may be impaired, but it is the right, and, indeed, it is the duty, of the society to protect the interests of the many rather than of the few. Persons who become members of such societies must take notice of this, and one person can not, therefore, demand that the welfare of the society and the interests of the many be sacrificed for his sole benefit.

In the case before us the change from the one plan to the other was not an arbitrary or unreasonable exercise of power, nor was it the repudiation of a debt, nor the destruction of a vested right. It was not unreasonable, because it may well be that the system of insurance originally adopted, which gave no heed to age, was so infirm as to be incapable of long enduring; it was not arbitrary, because the by-laws reserved the right of amendment, and a desire to promote the welfare of the society brought about the change; it was not the repudiation of a debt, because the right to the avails of assessments provided for by the contract was not taken away; it was not the destruction of a vested right, because the power to amend was, as reserved, a part of the contract from which the right of the beneficiary emanated, and because, also, the right to enter the new class was open to all members on equal terms.

There was a classification, it is true, according to age, but there was no inequality, because, as all men know, it is no more than just to require one whose life expectancy is brief to pay a higher rate than one whose age gives him, in the usual course of nature, a longer lease of life.

It is to be constantly kept in mind that the contract does

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not bind the society to pay a designated sum absolutely and at all events, but, on the contrary, the contract, by its express terms, limits the beneficiary to a specific fund derived from assessments. The right of the beneficiary, as fixed by the contract, is to receive the avails of the assessments. *Bacon Benefit Societies*, section 453.

There is no general fund from which a loss can be paid. All the money available for the payment of losses is derived from the assessment of the members of the class in which the loss occurs. It is, therefore, not legally possible for a beneficiary in one class to compel payment out of funds derived from premiums or assessments paid by the members of another class. Each class contributes to its own losses, but not to losses in other classes. Of this members and beneficiaries are bound to take notice, and they can not, therefore, demand that funds belonging to another class shall be diverted for their benefit.

Beneficiaries acquire their rights through the members. It is possible that in some exceptional particulars they may have rights which the members do not possess; but, in a case like this, where their contract restricts them to a specific fund, they certainly have no right to demand payment out of a fund belonging to another class. Their right to payment is confined to the fund designated by their contract, and they can not, with justice, demand that other funds shall be appropriated to the payment of their claim. It is enough for us to affirm this proposition, and that we may safely do, both upon principle and authority, without attempting to define what greater rights, if any, the beneficiary has than those of the assured.

We do not doubt that both the assured and the beneficiary have a right that is in its nature a vested one, but it is not an unqualified vested right; on the contrary, it is qualified and limited in a great degree. It is a right subject to the limitations, conditions and restrictions of the charter and the by-laws, which are factors of the contract. *Masonic Mutual*

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Benefit Society v. Burkhart, 110 Ind. 189; *Presbyterian Mutual Assurance Fund v. Allen*, *supra*.

Whatever the nature of the right, it is only such as the contract creates, no matter who becomes the party beneficially interested. The contract, with its limitations and conditions, is the primary source of the right to recover. *Supreme Commandery v. Ainsworth*, 71 Ala. 436; *Byrne v. Casey*, 70 Tex. 247.

As the contract, by force of the reservation in the by-laws, provides for a change in the by-laws, that right exists as against the beneficiary, as well as against the assured. The right, even if it were conceded to be a vested one in the strictest sense, would, in the hands of the beneficiary, or an assignee, be subject to the provision that changes in the by-laws may be made in the prescribed mode, since the contract is the source from which all rights flow.

There remains one other question, suggested in the early part of this opinion, and that is this: could the plaintiff recover more than nominal damages for the depletion of the class to which the assured belonged, even if it were conceded that the change constituted a breach of the contract? There can be, it seems clear to us, only one answer to this question, and that is, the damages are too remote, conjectural and speculative to form the basis of a legal recovery. The result that would have followed had not the system been changed is a mere matter of speculation and conjecture. It can not be said that if no change had been made there would have been no reduction in the number of the class. If the system originally adopted was not one (and this the facts stated make very probable) that would maintain itself, then the appellee would have been much worse off than she is now. Whether it could have endured can only be conjectured. The damages are both conjectural and remote. There is no connection between the change in the system and the depletion of the class of which Hussey was a member that can be legally said to be proximate and natural.

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The court erred in sustaining the demurrer to the third paragraph of the answer; but as the special finding shows that the appellee was, and is, entitled to a judgment for one hundred and seventy-three dollars, she will be allowed, if she so elects, to enter a remittitur for the proper amount within ten days, and in the event that she does enter a remittitur, the judgment will be affirmed; otherwise the judgment will be reversed, with instructions to overrule the demurrer to the third paragraph of the answer, and to proceed in accordance with this opinion.

Filed March 6, 1889.

No. 13,449.

THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. BONEY.

RAILROAD.—Consolidation.—Liability of New Company for Antecedent Debts.—

Where a consolidation of railroad companies takes place, in pursuance of the statute, the corporation into which the original companies are merged becomes liable for all the valid debts and obligations of the consolidated companies, and a judgment *in personam* may be rendered against it therefor.

SAME.—Execution.—What May Not be Sold.—Neither the franchise and privileges of a railroad company, nor any lands, easements, or things essential to the existence of the corporation, or necessary to the enjoyment of its franchise, can be sold on execution or order of court to satisfy a judgment at law against it. *Aliter*, as to locomotives, cars and other personal property.

SAME.—Contractor.—Lien.—Enforcement.—A contractor for the construction of a road-bed for a railroad company acquires, under the statute, a lien upon so much of the road-bed as is constructed by him, which may be foreclosed; but there is no statutory provision for the sale of the road

117	501
119	31
121	309
122	95
123	445
117	501
127	258
117	501
124	559
125	99
117	501
140	208
141	236
117	501
144	678
145	60
117	501
168	528
117	501
164	126
164	183

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as an entirety, or the franchise, or anything that would destroy or impair the use of the franchise, and while the corporation remains solvent payment must be enforced out of other property or funds in such appropriate manner as a court of equity may determine.

From the Porter Circuit Court.

G. W. Easley, G. W. Friedley and G. R. Eldridge, for appellant.

J. W. Youche, A. C. Harris and W. H. Calkins, for appellee.

MITCHELL, J.—This proceeding was instituted by Mathias Boney against the Louisville, New Albany and Chicago Railway Company, the complaint being essentially in the nature of a creditor's bill. Putting aside much irrelevant matter set up in the pleadings, the material facts upon which the questions for decision depend are the following:

In September, 1874, Boney entered into a written contract with the Indianapolis, Delphi and Chicago Railroad Company, under which he constructed the grade, and otherwise prepared about three miles of the company's road-bed in Lake county, ready for the reception of the ties and rails. In February, 1875, within the time prescribed by statute, he gave notice of his intention to hold a contractor's lien upon that part of the road-bed which he had constructed, stating in his notice that a specified sum remained due him for work performed under his contract. He subsequently instituted suit in the Lake Circuit Court, and in March, 1876, recovered a personal judgment against the railroad company, and obtained a decree foreclosing his lien, in pursuance of which he afterwards sold that part of the company's road-bed described in his lien and decree. Boney became the purchaser, the amount bid being only a part of the amount of his judgment. Subsequently other portions of the company's right of way were levied upon to satisfy the balance of the Boney judgment, which levy seems never to have been released, nor otherwise disposed of.

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After Boney had acquired his lien, the franchises and property of the Indianapolis, Delphi and Chicago Railroad Company were sold in pursuance of a decree foreclosing a trust mortgage which had been executed by the railroad company, but which was a junior lien to that of Boney. The sale resulted in the organization of a new corporation called the Chicago and Indianapolis Air Line Railroad Company, which succeeded to all the rights of the original corporation. Boney was not made a party to the foreclosure suit. The Chicago and Indianapolis Air Line Company completed and put in operation what was formerly known as the Air Line road, from Indianapolis to Chicago, in 1881, using the old right of way through Lake county, including the three miles theretofore constructed by the plaintiff, and upon and in respect to which he had taken the lien and the other proceedings above mentioned. Subsequently, in the same year, the corporation last above mentioned became consolidated with, and its property and franchises incorporated into, the Louisville, New Albany and Chicago Railway Company, which then owned and operated a railroad from Louisville to Michigan City. This latter company has since continuously owned and operated, as part of its system, what was formerly known as the Air Line road from Indianapolis to Chicago. After the consolidation it was adjudged, in an action to which Boney and the appellant railroad company were both parties, that the former took nothing by his purchase at the foreclosure sale made in pursuance of the decree foreclosing his contractor's lien above mentioned. Thereupon, in August, 1885, this suit was instituted by Boney in order to establish his claim against the appellant railroad company, and to obtain the decree of the court directing the sale of the road-bed constructed by him and for general relief.

The court found the facts specially, and gave judgment that the Louisville, New Albany and Chicago Railway Company pay the plaintiff the sum of four thousand five hundred and eighty dollars within forty days from the date

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of the judgment. It was further ordered that, in default of payment within the time fixed, the sheriff of Lake county should, after giving three weeks' notice, sell the railroad of the Louisville, New Albany and Chicago Railway Company, "as the same is now located, constructed, owned, operated, and controlled, from the city of New Albany, in Floyd county, Indiana, to Michigan City, in LaPorte county, Indiana, and from the city of Indianapolis, in Marion county, Indiana, to the State line between Indiana and Illinois, * * together with all the rights, franchises, privileges and immunities of said company connected therewith or incident thereto." From this judgment and order of sale the railway company prosecutes this appeal. Two questions are presented for decision: (1) Did the appellant railway company become liable, so that a judgment for the amount of the plaintiff's claim was properly rendered against it? (2) If it did become liable to pay the plaintiff's claim, can the order directing the sheriff to sell all of its property within the State of Indiana, including all the rights, franchises and privileges connected therewith or incident thereto, be maintained?

In respect to the first question, it may be said, an examination of the statute will disclose that ample provision is made for the consolidation of railroad companies, but there is no express statutory declaration that the corporation into which the consolidated companies become merged shall assume or become liable for the debts and obligations of the original companies. The effect of a statutory consolidation is, however, practically to dissolve the old corporations into the new, which takes their place and succeeds to all the property, rights, franchises and privileges of the several consolidated companies.

While it is an open question in some jurisdictions whether or not, in the absence of a statute, the debts of the original companies follow as an incident of the consolidation, and become by implication the obligations of the new corpora-

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tion, it is settled in this State that the act of consolidation involves an implied assumption by the new company of all the valid debts and liabilities of the consolidated companies. *Indianapolis, etc., R. R. Co. v. Jones*, 29 Ind. 465; *Columbus, etc., R. W. Co. v. Powell*, 40 Ind. 37; *Jeffersonville, etc., R. R. Co. v. Hendricks*, 41 Ind. 48.

The rule which the authorities support seems to be, that where one corporation goes entirely out of existence by being incorporated into another, if no arrangements are made respecting the property and liabilities of the corporation that ceases to exist the corporation into which it is merged will succeed to all its property, and be answerable for all its liabilities. *Thompson v. Abbott*, 61 Mo. 176; *Mount Pleasant v. Beckwith*, 100 U. S. 514; *Pullman Car Co. v. Missouri Pacific Co.*, 115 U. S. 587.

After the consolidation the liability of the new company is substituted for that of the original companies, which have, to all intents and purposes, ceased to exist. 2 Morawetz Corp., section 955. There was hence no error in rendering a judgment *in personam* against the Louisville, New Albany and Chicago Railway Company.

The other feature of the case presents a question of much greater difficulty. According to the established rule of the common law, which controls the current of modern authority, the franchises of a corporation, mere incorporeal hereditaments, were not subject to seizure and sale upon execution, in the absence of express statutory provisions authorizing the sale, and prescribing the method of transfer. It follows, as a natural sequence, that lands, easements, or things essential to the existence of the corporation and the execution of its corporate duty, and without which its franchise would be of no practical use, can not be levied upon and sold on execution at law, so as to detach them from the franchise and thus destroy its use. *Indianapolis, etc., G. R. Co. v. State, ex rel.*, 105 Ind. 37; *Ammant v. President, etc.*, 13 S.

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& R. 210; *Baxter v. Turnpike Co.*, 10 Lea, 488 (4 Am. & Eng. Corp. Cases, 134); *Herman Ex.*, section 361.

Thus it has been said, in effect, that the franchises and corporate rights of a company, and the means which are necessary to enable it to maintain its existence, and subserve the objects and purposes of its creation, are incapable of being granted away or transferred by any act of the company, without express authority, or by any adverse process against it. *Susquehanna Canal Co. v. Bonham*, 9 W. & S. 27.

Accordingly, where, upon an execution issued on a judgment recovered against a canal company, the marshal had seized and advertised for sale a toll-house and sundry canal locks and other tangible property, an injunction was sustained, the court holding that, in the absence of a statute, neither the franchise of the company, nor any lands or works essential to the enjoyment of the franchise, and which could not be separated from it without destroying or impairing its value, could be sold on execution. *Gue v. Tide Water Canal Co.*, 24 How. 257; *Covington Drawbridge Co. v. Shepherd*, 21 How. 112.

In a recent case, in which it appeared that a contractor had recovered a judgment against a railroad company, under which the "right of way to the railroad, so far as the right of way has been obtained, and all appurtenances belonging to said railroad," were sold by the sheriff and conveyed to the purchaser, the Supreme Court of the United States held the sale void, saying, in effect, that the company had no estate in its right of way capable of being sold on execution on a judgment at law, apart from its franchise to own and operate a railroad; that what the company acquired was merely an easement in the land to enable it to discharge its function of making and maintaining a public highway, the fee of the soil remaining in the grantor. Moreover, the court said, in substance, that it would be clearly violative of the policy of the State under whose laws the railroad company had been organized, to permit a private individual

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to seize and appropriate, by means of an execution sale, the right of way which had been acquired by the railroad company in pursuance of the purposes for which it was organized. *East Alabama R. W. Co. v. Doe*, 114 U. S. 340; *Freeman Ex.* (2d ed.), section 179.

"It may be considered as settled, that a corporation can not lease or alien any franchise or any property necessary to perform its obligations and duties to the State, without legislative authority." *Black v. Delaware, etc., Canal Co.*, 22 N. J. Eq. 130-399. *Thomas v. Railroad Co.*, 101 U. S. 71.

Although a corporation, in respect to its capital, may be private, it may have been created, nevertheless, to accomplish objects in which the public have a direct concern, and its authority to acquire and hold property may have been conferred upon it in order that these objects might be consummated. In such a case, the corporation takes its franchise, together with such property as the statute enables it to acquire by the exercise of the power of eminent domain, as a trust from the State, and it can neither alien the one nor the other, without special authority, nor can they be seized and sold by any adverse process against it, unless express provision to that end has been made by statute. *Stewart's Appeal*, 56 Pa. St. 413; *Richardson v. Sibley*, 11 Allen, 65.

Accordingly it was held that a corporation organized for the purpose of introducing water into a town for the accommodation of the inhabitants, was, in a certain sense, a corporation for public purposes, and that its buildings and appendages necessary for carrying on its operations were not subject to sale in the process of enforcing a mechanic's lien taken thereon. *Foster v. Fowler*, 60 Pa. St. 27.

"For the sake of the public, whatever is essential to the corporate functions shall be retained by the corporation. The only remedy which the law allows to creditors against property so held is sequestration. And that remedy is consistent with corporate existence, whilst a power to alien, or liability to a levy and sale on execution, would hang

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the existence of the corporation on the caprices of the managers or on the mercy of its creditors." *Plymouth R. R. Co. v. Colwell*, 39 Pa. St. 337 (80 Am. Dec. 526.)

While it is true that "the franchise to be a corporation is not a subject of sale and transfer unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected," and while the authorities abundantly justify the statement that property acquired and held by a corporation for the exclusive purpose of enabling it to accomplish the purposes of its creation can not, without like authority, be either directly or indirectly alienated, it does not follow that the creditors of such a corporation are remediless. 1 Freeman Executions, section 179.

Railroad corporations may sell or mortgage personal property, and the better view of the subject seems to be, that the corporation's right voluntarily to alienate property, and the creditor's power to subject it to the payment of corporate debts, stand upon the same footing. *Coe v. Columbus, etc., R. R. Co.*, 10 Ohio St. 372 (75 Am. Dec. 518.)

As has been said, there is a distinction between the road and structures immediately connected therewith, and appliances afterwards obtained for the purpose of operating the road. "The interest or right of way in the land required for the construction of the road, the timber and iron of the track, and the depots and structures for the supply of water and the like, are said to be part of the realty; and the road is not regarded as so constructed and prepared for use until such things are affixed." But when the road is thus constructed and prepared for use, locomotives, cars and other articles and materials, some of which are consumed in the use, are requisite, and the conclusion is well supported that these, when not in actual use, are liable to seizure and sale for the payment of debts. *Boston, etc., R. R. Co. v. Gilmore*, 37 N. H. 410 (72 Am. Dec. 336); *Pierce v. Emery*, 32 N. H. 484; *Coe v. Columbus, etc., R. R. Co.*, *supra*.

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The seizure and sale of such property does not confer any right in the franchise of the corporation or to any of the privileges of the corporation. It is analogous to the case in which it appeared that the copyright of a map had been acquired under the act of Congress, and the copper-plate engravings of the author had been seized and sold on execution; it was held that the intangible right to strike off and sell copies of the map was not sold. *Stephens v. Cady*, 14 How. 528.

In all those cases in which the owner of an intangible right, such as letters-patent and the like, might himself, voluntarily, assign it, although property of that description is not capable of being seized and sold on account of its incorporeal nature, it may, nevertheless, be subjected to the payment of the owner's debt by a bill in equity. *Ager v. Murray*, 105 U. S. 126.

A court of equity, may by its decree, compel the owner to execute an assignment of letters-patent, because he is himself possessed of the power to assign. But in the absence of a statute authorizing it, a court of equity can not compel a railroad corporation to transfer its franchise or such property as is essential to the exercise of its corporate obligations, because, in the absence of such authority, the corporation could not itself voluntarily alienate or assign its property of that description.

The plaintiff in the present case acquired a mere statutory lien upon so much of the road-bed as he had constructed. The statute provides that the lien may be foreclosed, but it makes no provision for the sale of the franchise, or of the road as an entirety, or of anything that would in effect destroy or impair the use of the franchise.

The statutes regulating the construction and operation of railroads within the State, plainly contemplate that the power to condemn lands and construct and operate railroads shall be confided to railroad corporations. There is no provision by which an individual citizen may condemn land for railroad

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purposes, nor is it contemplated that lands condemned and used for such purposes may afterwards be sold out on execution or by order of the court, and become the property of an individual, so long as the corporation is not dissolved and continues in the use of its franchises and property. The statute, unlike that which authorizes railroad companies to execute mortgages on their property and franchises, gives the contractor a lien, and nothing more.

As it appears in the present case that the debt remains unpaid, the lien affords the basis for the exercise by a court of chancery of its flexible jurisdiction to coerce payment of the debt. The Legislature doubtless deemed it the wiser course to leave the method of coercing payment in each case to the court, rather than to prescribe a method which might be suited to one case and not to another. While the corporation is solvent, with property and officers and agents, subject to the order and process of the court, within the State, a court of chancery can not be without expedients for coercing payment out of any money or property which the corporation itself might have applied to that purpose.

We know judicially that the Louisville, New Albany and Chicago Railway Company has hundreds of miles of railroad in operation in the State of Indiana. There is no suggestion that the corporation is insolvent. It has, aside from its franchise and fixed property, perhaps many thousands of dollars' worth of property within the State which is subject to seizure and sale; besides, it has many financial officers and agents in the State who receive daily thousands of dollars for the corporation. All these are subject to the order and process of the court. This is the extent to which the court can go until it appears that the corporation is insolvent and unable to pay its debts or meet its current obligations and liabilities—unable, in fact, longer to discharge the duties resting upon it as a corporation. In such a case, doubtless, a court of chancery would have the power to take possession of the corporate property by means of a receiver and wind up the

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corporation and sell its property. Upon that subject we decide nothing until a case arises.

The conclusion of the whole matter in the present case is, that the order of the circuit directing the railroad to be sold as an entirety, together with all its franchises, privileges and immunities incident thereto, was in excess of the power of the court. So far as cases relied on seem to support a contrary doctrine from that above enunciated, they are not deemed applicable to the facts in the present case. *Dayton, etc., R. R. Co. v. Lewton*, 20 Ohio St. 401; *Railroad Co. v. James*, 6 Wall. 750.

The justice of the case requires that, to the extent that the decree of the court orders the sale of the railroad of the Louisville, New Albany and Chicago Railway Company, as in the decree specified, including its franchises, privileges and immunities connected therewith, it should be modified and reversed with the costs of this appeal. So far as the decree orders and adjudges that the above named railroad company pay the plaintiff the sum therein named, it is affirmed, with leave to take such further steps, not inconsistent with this opinion, as may be deemed necessary to coerce payment of the judgment.

Filed March 6, 1889.

No. 13,370.

DIVEN ET AL. v. JOHNSON.

CONTRACT.—Written Lease.—Contemporaneous Parol Agreement.—Evidence.—Damages.—Counter-Claim.—In an action by a lessor, alleging breaches by the defendant of a written contract of lease, which appears on its face to be complete, and not dependent upon, or collateral to, any other contract, the defendant will not be permitted to prove, by way of counter-claim or recoupment, a contemporaneous parol agreement by the lessor to ditch the land embraced in the lease, and damages resulting to him from a breach thereof, as a written contract can not be thus varied or contradicted.

From the Madison Circuit Court.

H. D. Thompson and *W. S. Diven*, for appellants.

C. L. Henry and *H. C. Ryan*, for appellee.

OLDS, J.—On the 9th day of August, 1883, the appellants, Charles E. and William S. Diven, and the appellee, William H. Johnson, entered into a written contract by which Diven and Diven leased to Johnson certain real estate situate in Madison county, and described in the contract, for the term of one year from March 1st, 1884, on the conditions stated in the contract, which are substantially as follows: Johnson to farm, in good farmer-like manner, all of the farm, and to put in such crops and kinds of grain as Diven and Diven may direct; to keep fence-corners and along ditches mowed clear of weeds and bushes; to haul out all manure made on the farm as may be directed; to keep fences in good repair, and to deliver to Diven and Diven one-half of all products raised on the farm, in the bushel or mow, at a point not further distant than Pendleton; Johnson to put wheat in such ground as may be directed, in autumn of 1883, on same terms as above stated; Johnson to clear underbrush out of the orchard, trim trees and cultivate the ground, on same terms as stated; to have all apples not otherwise cared for made into cider,

117 519
118 173
120 588
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128 537
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143 610

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and the pomace cared for, so that the most vinegar can be gotten therefrom, Johnson to have for his share one-half of all other fruits.

It is further agreed that each party to the contract shall furnish an equal amount of stock sufficient for the farm, and no stock shall be kept on the farm but partnership stock, except work-horses and milk-cows for use of the family, and such stock as Diven and Diven shall keep on their reserved pasture, the stock to be cared for by Johnson from the products of the farm as may be most advantageous to their common interests, the proceeds from the stock to be divided equally; Johnson to have his firewood as directed by Diven and Diven, and not to cut any timber except as directed; Johnson to put up all clover and timothy, and to deliver to Diven and Diven one-half in mow as directed; the stalk pasture to be pastured in common or divided equally, as may be agreed upon, and Johnson to gather all corn and have all pastures ready for use in good season, not later than January 1st; stalks to be pastured only when ground is frozen, and not later than March 1st, and should wheat be sown on corn-ground, to be pastured only when snow is on the ground, and not later than February 1st; Johnson to have the house on the farm for his residence, and the barn on north side of the turnpike, the said Diven and Diven reserving the barn on south side of the turnpike for their own use; Diven and Diven to have the privilege at any time of entering any building or any part of the farm to make any improvements they may see fit on any of the buildings or grounds, and have the right to cut any wood or timber they may desire and remove it at any time; Johnson to take good care of buildings and keep them in as good repair as they are or may be put, and turn them over without further notice March 1st, 1885; Diven and Diven to have the right to enter on land and put in wheat, or have it done, on such ground as they desire, in autumn of 1884; Johnson to take no straw off the farm,

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and to cut sufficient fodder to feed all stock kept in common, and to mow fence-corners and along ditches in July or August. It is further agreed that all crops and products shall remain the property of Diven and Diven until all conditions of the contract are fully performed.

The appellants, Diven and Diven, brought this suit against appellee, Johnson, alleging several causes of action. The complaint is in four paragraphs. The theory we take of this case is that it is only necessary to consider the fourth paragraph of the complaint and the answer thereto. The fourth paragraph of the complaint declares upon the written contract, the terms of which we have stated, alleging a failure on the part of the appellee to farm the land in a good, husbandmanlike manner, and to mow the weeds and brush along the fences and ditches on the farm, and that damage has resulted to the appellants in the sum of one thousand dollars.

The defendant filed an answer in five paragraphs. The fifth paragraph of answer is addressed to the fourth paragraph of complaint, and is as follows: "And for a fifth and further answer herein to the fourth paragraph of plaintiffs' complaint, defendant, by way of counter-claim, or recoupment, says that at the date of the execution of the written contract sued upon in said paragraph, and as a part of the consideration for said contract, and in addition to the consideration stated therein, the plaintiffs entered into a parol agreement with this defendant wherein and whereby they, the plaintiffs, stipulated and agreed with this defendant that they would ditch said real estate and land set out and described in said lease, in a good and sufficient manner, before the time for the planting of corn for the year 1884, and the time covered by said lease; that if said ditching had been done on said land as agreed upon, said land would have been dry and rendered much more susceptible of cultivation, and would have produced much larger and better crops than it would in the condition it was in at the time and date of said lease and contract, but that said plaintiffs, wholly ignoring the said

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covenants, promises and agreements, and wholly failing and refusing to so ditch said land as they agreed to, this defendant was unable to raise such crops on such land as he could have done had plaintiffs carried out their said agreement and caused said land to be ditched, by reason of which facts and the promises aforesaid this defendant was damaged in the sum of five hundred dollars, and he offers to recoup, or set off, against any amount that may be found due plaintiffs an amount equal thereto, and demands judgment for five hundred dollars, the residue."

The plaintiffs filed a demurrer to this paragraph of answer, for the cause that "said paragraph does not state facts sufficient to constitute a defence to plaintiffs' complaint," which demurrer was overruled and exceptions reserved by the plaintiffs. Trial and verdict and judgment for defendant. The ruling of the court on the demurrer is assigned as error, and is the first question to be considered.

It is a well settled principle that none will controvert, that a written contract can not be contradicted or altered by parol evidence. But it is sought in this case to avoid this well settled doctrine by alleging that the parol agreement sought to be proven in this case was an independent contract, which constituted the basis of, and consideration for, the written contract, and that it does not vary or change the written contract.

Greenleaf, in his work on evidence, vol. 1, section 275, says: "When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquium between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend in many instances to substitute a new and different contract for the one which was really agreed upon, to

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the prejudice, possibly, of one of the parties, is rejected. In other words, as the rule is now more briefly expressed, 'parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.'

This doctrine is substantially laid down and adhered to by the decisions of our own court. In the case of *Singer M'f'g Co. v. Forsyth*, 108 Ind. 334, the court quotes from *Rutland's Case*, 5 Coke's R. 26: "It would be inconvenient," says Lord Coke, "that matters in writing made by advice and on consideration, and which finally import the certain truth of the agreement of the parties, should be controlled by averment of the parties to be proved by the uncertain testimony of slippery memory. And it would be dangerous to purchasers and farmers, and all others in such cases, if such nude averments against matter in writing should be admitted." And the court adds: "Obligations which parties have deliberately entered into, and put in writing, can not therefore be pared down, taken away or enlarged by parol evidence." In the same case the court also says: "The rule that a formal written contract, which appears to be complete, will be presumed to be the repository of the final intentions of the parties, in regard to the subject-matter of the agreement, and that it excludes proof of any prior or contemporaneous parol stipulations which would contradict the writing, is abundantly settled, and should not, on account of its importance, be relaxed in any degree."

The case of *Carr v. Hays*, 110 Ind. 408, was where Hays executed a warranty deed to Pettit, and Pettit executed back to Hays a contract agreeing to assume and pay twenty-one thousand and eighty-one dollars to certain parties, and that if Hays should pay back to Pettit the said amount, with ten per cent. interest thereon, within three years, then he would convey to said Hays a certain tract of real estate. It was sought in that action to aver and prove, as a further consideration for the deed from Hays and wife, and as a fur-

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ther inducement to Hays to execute said deed and accept such written contract, that Pettit had verbally agreed with Hays that he should continue to occupy and have the use of the lands so conveyed for the term of three years; that Pettit would furnish him five hundred yearling steers to be kept by him on the said lands so conveyed and other lands, and Hays should mortgage the steers to repay Pettit for the money so paid for them; and that when said steers matured and were sold, Hays should have the excess over and above the repayment of the purchase-money for the steers, and interest, as a compensation for his care and management of the lands.

The court in that case says: "Under the averments of these paragraphs of complaint, the warranty deed of appellee to Pettit, and the written contract given by Pettit to appellee, were both executed on the same day; each was the consideration for the execution of the other; they both constituted parts of one and the same transaction, and together they formed one and the same contract. In this contract, all oral negotiations and verbal agreements, precedent or concurrent, by or between the parties in relation to the subject-matter of such contract, were completely merged; and the two parts of such contract, appellee's deed and the writing executed by Pettit in consideration of such deed, became and were the exclusive evidence of the only covenants and agreements, of or concerning the subject-matter of such contract, by which the respective parties ultimately bound themselves." The court in that case further says: "In each of these paragraphs, it was alleged, as we have seen, that Pettit's verbal contract was made as a further consideration for, and as an inducement to, the execution of appellee's deed. These averments being true, it can not be correctly said that such verbal contract was, in any legal sense, collateral to appellee's deed or Pettit's written contract of assumption, which together constituted their written contract. It is well settled by our decisions, that such a contract can not be con-

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trolled, diminished or enlarged by any precedent or contemporaneous verbal agreement by or between the parties, in relation to the subject-matter of the written contract."

The principle enunciated by the authorities from which we have quoted is decisive of this case. The contract in this case appears to be complete within itself. No suggestion arises out of it that it is dependent upon, or collateral to, any other contract or agreement, either oral or written. It is, on the one hand, a lease by appellants to the appellee of the real estate described in the lease, and as a consideration for such lease and use of the land the appellee agrees to do and perform certain things, and to deliver to appellants a stipulated share of the crops. On the other hand, as a consideration for the things appellee is to perform, and the share of crops he agrees to deliver to appellants, appellants are to give to him the use of the land in the state of cultivation in which it then was. To hold that the lessee, in a contract like the one in this case, can allege and prove a contemporaneous parol contract, affecting and changing the terms, consideration and liability on the written contract, would permit the lessor, on the other hand, to allege and prove a contemporaneous verbal contract, by which, as an additional consideration for the lease, the lessee was to purchase and keep a certain number of cattle or other stock for a certain period of time, and upon the sale of the same to pay to him the net proceeds thereof. Indeed, it would destroy the whole force, effect and purpose of the written contract. There would be no purpose or benefit in stating in the written contract what either party was to do in consideration for the use of the land on the one hand, or for the farming and cultivating on the other, as all that would be necessary to avoid the effect of such a written contract would be to aver, as an additional consideration for the use of the land, or for the farming of the land, that it was verbally agreed at the time that certain other things were to be done, performed or paid. In this case the verbal contract alleged is in relation to the very subject-matter of the con-

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tract. It is one of the matters that, if talked over at the time as alleged, and agreed upon by the parties, they would naturally have inserted in the contract. It relates to the lease of the real estate, as does the hauling out of the manure, cutting weeds and brush along ditches and fences, and firewood for the use of appellee, which are inserted in the contract. The contract sued upon appears to be complete in itself. There is nothing to indicate that it is collateral to, or dependent upon, any other contract, either oral or written, and, in the absence of fraud or mistake, it must be conclusively presumed that it contains the whole agreement of the parties and the manner and extent of their undertakings, and it can not be affected, altered or changed by any precedent or contemporaneous parol agreement. In addition to the authorities heretofore referred to, see *Starkie Evidence*, (10th ed.) top pp. 648, 665; *Welshbillig v. Dienhart*, 65 Ind. 94; *Wilson v. Deen*, 74 N. Y. 531.

We are aware that some of our decisions, in considering particular cases, have gone a good ways in the admission of parol evidence—on the theory that it is admissible in such cases to show the consideration of the contract in question—and possibly, carried to their legitimate extent, they would support the theory of counsel for the appellee and the ruling of the court below in this case; but we are rather inclined to limit than extend the doctrine as laid down and applied in the case of *Welz v. Rhodius*, 87 Ind. 1, and to adhere to the older as well as the more recent cases which we have referred to in support of this opinion.

The court below erred in overruling the demurrer to the fifth paragraph of answer, and for such error the case must be reversed.

The remaining errors assigned grew out of the ruling on this fifth paragraph of answer, in admitting evidence and charging the jury on the same theory that the answer was held good, and therefore it is unnecessary to prolong this opinion by stating and deciding them, as the theory we have taken of

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the law in passing upon the paragraph of answer fully disposes of the other questions, and they will not arise upon another trial of the case.

Judgment reversed, with instructions to the court below to sustain the demurrer to the fifth paragraph of answer, and for further proceedings in accordance with this opinion.

Filed March 6, 1889.

No. 13,517.

THE BRAZIL BLOCK COAL COMPANY v. YOUNG.

MASTER AND SERVANT.—*Safety of Place of Employment.—Duty of Employer as to.*—It is the duty of an employer to use ordinary care and reasonable skill to make safe the place where he requires his employees to work.

SAME.—*Delegation of Duties.—Master's Liability.*—An employer can not escape liability by delegating to another the performance of the duties resting upon him in the capacity of employer.

SAME.—*Minor.—Neglect of Master.—Necessary Averments in Complaint.*—Where a minor is injured by reason of the alleged neglect of his employer, a complaint by his father for damages must show one of three things: (1st) That the child was too young to be put to the service he was required to perform; or (2d) that neither he nor the plaintiff had notice or knowledge of the augmented danger caused by the master's neglect; or (3d) that the master, knowing the age and inexperience of the child, neglected to give him the necessary warning and instruction.

SAME.—*Pleading.—Complaint.—Averment of Freedom from Contributory Negligence.—Effect of.*—An averment in a complaint that the plaintiff was free from contributory negligence does not show actionable negligence on the part of the defendant.

SAME.—*Complaint.—Culpable Negligence.—Averment as to.*—Such facts must be alleged in the complaint as affirmatively show the defendant to be guilty of culpable negligence, for otherwise his act is not actionable, even if the injured person was entirely free from fault.

From the Clay Circuit Court.

117	520
119	467
117	520
124	97
124	498
127	51
117	520
121	534
122	243
122	446
123	242
117	520
124	159
117	520
128	61
128	499
129	415
117	520
140	653
143	576
117	520
151	308
117	520
153	622
117	520
154	154
117	520
159	85
117	520
165	298

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W. W. Carter, G. A. Knight and A. W. Knight, for appellant.

S. M. McGregor and J. A. McNutt, for appellee.

ELLIOTT, C. J.—The complaint alleges that the minor son of the appellee, sixteen years of age, was employed in the coal mine of the appellant, and that “it became the duty of the defendant to construct, keep and maintain the entrances, avenues, passages and roadways in said mine, over, along and through which plaintiff’s son was required to pass, in the performance of his duties as a driver, in a safe and secure condition; but defendant, in disregard of its duty in this respect, negligently suffered and permitted the roof in said entrances, passages and roadways, at, in and around the place where plaintiff’s son was injured, to be and become insecure, unsafe and in a dangerous condition, and negligently failed to secure said roof at said point by properly propping and timbering the same, or taking down the loose and dangerous portions thereof, notwithstanding said defendant had notice and knowledge of the insecure and dangerous condition of such roof, at, about and near the place where plaintiff’s son was injured, before said rock and slate fell upon plaintiff’s son, by reason of which plaintiff’s son was injured,” without any fault on his part or that of the plaintiff.

It is established law that an employer must use ordinary care and reasonable skill to make safe the place where he requires his employees to work. *Louisville, etc., R. W. Co. v. Sandford, ante*, p. 265; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Krueger v. Louisville, etc., R. W. Co.*, 111 Ind. 51; *Indiana Car Co. v. Parker*, 100 Ind. 181.

This is a duty which rests upon the employer, and which he can not delegate. No matter by whom the duty is performed, the employer is responsible if it is negligently performed and from that negligence injury results. The employer can not escape liability by delegating it to an agent. Some duties he may delegate and escape responsibility, but

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duties resting upon him in the capacity of an employer he can not delegate to another so as to escape liability. *Indiana Car Co. v. Parker, supra*, and cases cited; *Krueger v. Louisville, etc., R. W. Co., supra*; *Pennsylvania Co. v. Whitcomb, supra*.

The complaint shows that it was the duty of the employer that was negligently performed, since it avers that it did not make safe the place where it required its employees to work. There is, on the face of the complaint, no question as to the right to recover for the negligence of a co-employee, for the duty shown is that of the employer, and it is one which the law commands the employer to perform. The case of *Indianapolis, etc., R. W. Co. v. Johnson*, 102 Ind. 352, is not in point. The English cases cited by counsel are no longer recognized as authority.

The duty of the employer to use ordinary care and skill to make the working-place he provides for his employees reasonably safe, exists, no matter how dangerous may be the service. He does not warrant the safety of the working-place, but he does undertake that he will use reasonable skill and care to make it as safe as the nature of the service will admit. He must do what ordinary care and diligence can do to make the place reasonably safe, and when he has done this he has performed his duty, and his employees assume all the ordinary risks of the service, however hazardous that service may be. They do not, however, assume risks not incident to the service, but caused by the master's neglect of duty. *Louisville, etc., R. W. Co. v. Sandford, supra*. But adult persons do assume all the risks caused by the master's negligence, if, with knowledge of that negligence and its consequences, they continue in the master's service, for it then becomes one of the incidental risks of the employment, which employees voluntarily assume. *Louisville, etc., R. W. Co. v. Sandford, supra*.

If the person injured, in this instance, had been of full age, the rules we have stated would unquestionably require

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us to hold the complaint bad, for the reason that it does not aver that he did not have notice of the augmented danger caused by the employer's neglect of duty. If, therefore, the complaint, lacking as it does this important averment, is good, it must be for the reason that it alleges that the appellee's son was not of full age. This, then, is the question: Does the averment of non-age dispense with the allegation of the absence of knowledge on the part of the person injured by the master's neglect of duty?

The authorities do make a distinction, and with sound reason, between children and adults. Persons of tender years must not be set to work in dangerous places by their employers, without due warning and instruction. Indeed, it is not always that warning and instruction will absolve the master. *Hill v. Gust*, 55 Ind. 45; *Binford v. Johnston*, 82 Ind. 426; *Pennsylvania Co. v. Long*, 94 Ind. 250; *Indianapolis, etc., R. W. Co. v. Pitzer*, 109 Ind. 179; *Atlas Engine Works v. Randall*, 100 Ind. 293; *Railroad Co. v. Fort*, 17 Wall. 553; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572; *Sullivan v. India Mfg. Co.*, 113 Mass. 396.

"Notice of danger," says Dr. Wharton, in discussing this question, "is not enough. The child must have sufficient instruction to enable him to avoid danger." Wharton Neg., section 216. Not very different is the opinion of Mr. Wood, who says: "But in the case of young children, a mere warning to the child is not the measure of the master's duty; he must instruct him as to the methods of working with and about it, and it is negligence *per se* for him to put such a person at work with or in the vicinity of dangerous machinery, or to subject him to any extraordinary hazard, until he has been properly made to understand the method of using it, as well as the hazards incident to its use." Wood Master and Servant, section 350.

The authorities to which we have referred establish the doctrine that the master's duty is much broader in cases where young children are employed than in cases where the

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employees are of full age, but they do not fully determine the question before us, for that question is, whether, conceding the duty to exist, any breach is shown? We suppose it to be clear that, when a plaintiff charges a defendant with a negligent breach of duty, he must state facts from which actionable negligence can be inferred, for the general rule is that negligence can not be presumed. This general rule is uniformly applied to employers and employees, and it is presumed that the employer has done his duty. *Louisville, etc., R. W. Co. v. Sandford, supra*; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212. This presumption is, in effect, a *prima facie* case in favor of the employer. *Louisville, etc., R. W. Co. v. Thompson*, 107 Ind. 442. To defeat this presumption of duty performed, it is necessary to state facts rebutting the presumption, otherwise there can be no cause of action. A violation of duty must therefore be shown, otherwise the complaint must be adjudged to be bad. This is so because culpable negligence can not be presumed in aid of a complaint. *Toledo, etc., R. W. Co. v. Brannagan*, 75 Ind. 490; *Indiana, etc., R. W. Co. v. Greene*, 106 Ind. 279.

The averment that there was no contributory negligence absolves the plaintiff from fault, but it does not show actionable negligence on the part of the defendant. It is one thing to show the plaintiff free from fault, and quite another to show the defendant in fault. The averment that the plaintiff and his son were free from negligence is not sufficient to cover the question here presented. *Louisville, etc., R. W. Co. v. Sandford, supra*.

The question here is, does the complaint show such fault on the part of the employer as to vest the employee with a cause of action?

In order to show the defendant guilty of an actionable tort, the complaint should have averred one of three things: (1st) That the plaintiff's son was too young to be put to the service he was required to perform; or (2d) that neither he nor the plaintiff had notice or knowledge of the augmented

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danger caused by the master's neglect; or (3d) that the master, knowing the age and inexperience of the child, neglected to give him the necessary warning and instruction.

We can not supply any of these averments by intendment, for, as we have seen, the presumption is that the master was not guilty of a negligent breach of duty. We can not, upon the facts stated in the complaint, presume that the plaintiff's son was too young to know the risks of his employment; nor can we presume that he was not qualified by age and experience to fully judge of the character and hazards of his service. *Atlas Engine Works v. Randall*, 100 Ind. 293; *Pittsburgh, etc., R. W. Co. v. Adams*, 105 Ind. 151; *Louisville, etc., R. W. Co. v. Frawley*, 110 Ind. 18; *Ciriack v. Merchants' Woolen Co.*, 146 Mass. 182 (4 Am. St. R. 307).

We can not say that his age, experience and capacity were not such as to justify the appellant in employing him, and assuming that his capacity and experience were such as to charge him with the assumption of the risks of his service. *Pittsburgh, etc., R. W. Co. v. Adams*, *supra*.

In *Louisville, etc., R. W. Co. v. Frawley*, *supra*, it was said, in speaking of the employment of a minor, that, "In such a case, there is held to be an implied contract on the part of the employee to take all the risks fairly incident to the service, and to waive any right of action against the employer for injuries resulting from such risks. Beach Cont. Neg., section 8."

To take the case out of the operation of this general rule, facts must be averred constituting the case an exception, otherwise the general rule must prevail. *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20.

The facts must be such as affirmatively show the defendant to be guilty of culpable negligence, for otherwise his act is not actionable, even if the injured person was entirely free from fault. These facts are here absent.

The appellant was not entitled to an instruction directing the jury to return a verdict in its favor. Counsel, in their

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argument, assume, what can not be granted, that the same rules invariably apply to young boys that apply to men. It is, indeed, doubtful whether the instruction should have been given had the injured person been an adult; and it is quite certain that, considering the age of the boy, it would have been error to give it. Undoubtedly all who go into mines assume risks, but the employer has no right to increase those risks by omitting to exercise reasonable care and diligence; on the contrary, he is charged with the duty of using reasonable care to reduce as much as the nature of the business will permit its risks and dangers. An insurer of the safety of his employees he is not; but a reasonably prudent and careful manager of his mine he must be. Especially does this duty rest upon him where he takes into his service young and inexperienced persons. He has no right, in morals or in law, to demand that such persons shall suffer from his negligence and he himself be absolved.

Judgment reversed, for the reason that the complaint is insufficient.

Filed March 5, 1889.

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180 287

No. 13,390.

RATLIFF v. STRETCH.

PLEADING.—*Uncertainty.*—*Motion to make Specific.*—*Practice.*—The remedy for want of certainty in a pleading is by a motion to make it more specific.

SAME.—*Demurrer to Answer.*—*Harmless Error.*—Available error can not be predicated on a ruling sustaining a demurrer to one paragraph of an answer if the facts alleged therein are admissible in evidence under another paragraph which remains in the record.

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MARRIED WOMAN.—*Judgment.*—*Estoppel.*—A married woman is bound by the decree of a court of competent jurisdiction, in a suit in which she is a party, the same as a *feme sole*.

QUIETING TITLE.—*Description.*—*Void Decree.*—A decree quieting title is void if the description of the land can not be ascertained from the record.

SAME.—*Defences Admissible under General Denial.*—*Harmless Error.*—In a suit to quiet title all defences may be given in evidence under the general denial, and, when it is pleaded, there is no available error in sustaining a demurrer to special paragraphs of answer.

From the Grant Circuit Court.

A. Steele, R. T. St. John and H. Brownlee, for appellant.

R. W. Bailey, for appellee.

COFFEY, J.—This was an action in the circuit court by the appellant against the appellee to quiet title to the real estate described in the complaint, situate in the original plat of the town of Marion.

The appellee answered the complaint by a general denial. She also filed a cross-complaint in three paragraphs, the first of which was afterwards withdrawn.

The second paragraph alleges that the appellee, as the widow of James A. Stretch, deceased, is the owner in fee of one-third of the real estate described in the complaint; that the plaintiff is in possession thereof, claiming title thereto. Prayer that her title be quieted, and that she have possession.

The third paragraph alleges that the appellee, as the widow of James A. Stretch, is the owner in fee of the undivided one-third of the land described in the complaint; that the plaintiff has been in the possession of the same for the period of ten years, renting the same to third parties, from whom he has collected six hundred dollars per year; that the rental value of defendant's one-third was three hundred dollars per year, which plaintiff collected and converted to his own use. Prayer for an accounting and for partition.

The appellant demurred to each paragraph of the cross-complaint, but his demurrer was overruled and he excepted.

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The appellee filed an amended first paragraph of cross-complaint, which alleges, substantially, that the real estate in controversy was owned by James A. Stretch, who was the husband of appellee; that Newton P. Stewart and Phillip Gallagher obtained a judgment in the Grant Circuit Court, in May, 1865, against the said James A. Stretch; that in October, 1865, Charles F. Thompson *et al.* also recovered a judgment in said court against him; that executions were issued on both of said judgments to the sheriff of Grant county, and levied upon said land; that said sheriff sold the same, on the said judgment of Stewart and Gallagher, to John Brownlee for the sum of one thousand dollars; that said sheriff also sold said land afterwards, on the judgment so recovered by Thompson *et al.*, to Davidson Culbertson for the sum of eighty-five dollars, which last sale was subsequently set aside; that the only title the plaintiff holds to the land in dispute is by virtue of quitclaim deeds from said Brownlee and Culbertson, whose only title was by virtue of said sales; that the plaintiff, by virtue of said quitclaim deeds, has been in possession of said land since the year 1868, and has received all the rents and profits thereof; that the defendant, at the time of the rendition of said judgments, was the wife of the said James A. Stretch, and continued so to be until his death, which occurred on the 20th day of June, 1880. Prayer for an accounting, and for a decree permitting appellee to redeem.

The appellant answered these several paragraphs of the appellee's cross-complaint by an answer containing seven paragraphs. The first is a general denial.

The second and fifth paragraphs of this answer are affirmative answers, addressed to the second paragraph of the cross-complaint.

The third paragraph is addressed to the third paragraph of the cross-complaint, and alleges, substantially, that in the lifetime of James A. Stretch appellant became and still is the owner in fee of all his interest in the real estate in contro-

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versy, upon judicial sale; that by virtue of his title so procured he took possession of the same; that it is suitable for a business house only; that at the time he so took possession of the same it was unimproved; that he has erected thereon a brick building of the value of \$10,000, a part of which improvement was made during the lifetime of the said James A. Stretch, and part of the same, of the value of \$1,000, since his death, all of which improvements were made with the knowledge and consent of the appellee; that the appellant has paid for taxes and street improvements against said property the sum of \$2,000; that he holds a mortgage on said property, executed by the appellee and her husband, for \$450, dated July 24, 1864, which is wholly unpaid. Prayer that in the event partition be awarded appellee these sums be taken into account.

The fourth paragraph is addressed to the whole cross-complaint, and alleges, in substance, that the land in dispute was conveyed to appellee prior to August, 1864; that at the time of the conveyance to her Newton P. Stewart and Phillip Gallagher owned a judgment rendered against James A. Stretch in the Grant Circuit Court; that at the August term of said court for the year 1864 said Stewart and Gallagher filed their complaint in said court against the appellee and her husband, the said James A. Stretch, praying that their said judgment be declared a lien on said real estate; that said court in said cause found, ordered and decreed against the appellee that said land and her interest therein be sold to pay said judgment, and that the same was a lien thereon; that upon said decree said land was sold by the sheriff of said county to John Brownlee, who conveyed the same to the appellant; that at the spring term, 1868, of said court the appellant filed his complaint against the said James A. Stretch and the appellee, alleging that he was the owner in fee of said land, and praying that his title thereto be quieted; that in said cause it was duly adjudged and decreed by the court

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that neither of said defendants therein had any right, title or interest in or to said land, and that appellant's title thereto be quieted, and that defendants be forever enjoined from in any manner interfering therewith ; that appellee has acquired no title in or to said real estate of any kind or description since the rendition of said decree.

The sixth paragraph is addressed to the third paragraph of the cross-complaint, and avers substantially the same facts set out in the fourth paragraph of the answer, with the additional allegations that James A. Stretch purchased the land in dispute with his own funds, and had the same conveyed to the appellee, who was his wife, for the purpose of cheating and defrauding his creditors ; that said conveyance was set aside at the suit of Stewart and Gallagher in the Grant Circuit Court, and said property sold by the sheriff and purchased by Brownlee, who conveyed it to the appellant.

The seventh paragraph of the answer to the cross-complaint is addressed to the complaint as a whole, and alleges substantially the facts averred in the sixth paragraph of the answer.

The court sustained a demurrer to the second, fourth, fifth and seventh paragraphs of the answer to the cross-complaint, and the appellant excepted.

The appellee filed a reply to the third and sixth paragraphs of the answer to the cross-complaint, and the cause, being at issue, was submitted to the court for trial, without the intervention of a jury. Upon the evidence adduced, the court found for the appellee upon the third paragraph of her cross-complaint, and rendered a decree for the sale of the property in controversy, and for the payment to her of her share of the proceeds of the sale.

The appellant assigns as error :

First. That the court erred in overruling the demurrer to the first, second and third paragraphs of the cross-complaint.

Second. That the court erred in sustaining the demurrer

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to the second, fourth, fifth and seventh paragraphs of the answer to the cross-complaint.

Third. That the court erred in overruling the motion for a new trial.

We think that each of the paragraphs of the cross-complaint stated a good cause of action. It is true that the second paragraph is not as specific as good pleading would require, but the remedy for a defect of that kind is by motion to make more specific, and not by demurrer. We do not think the court erred in overruling the demurrer to the cross-complaint.

As we have seen, the second and fifth paragraphs of the answer to the cross-complaint were addressed to the second paragraph of that pleading. As that paragraph was an action to quiet title, all defences, both legal and equitable, could have been given in evidence under the general denial, which was the first paragraph of the answer. There was, therefore, no available error in sustaining the demurrer to these paragraphs. Annotated Indiana Practice Code, section 1070; *West v. West*, 89 Ind. 529; *Hogg v. Link*, 90 Ind. 346.

The fourth and seventh paragraphs of the answer to the cross-complaint, in our opinion, stated a good defence. A married woman is as much bound by the decree of a court of competent jurisdiction as a *feme sole*. *Wright v. Wright*, 97 Ind. 444; *Gall v. Fryberger*, 75 Ind. 98.

But it is claimed by the appellee that no available error was committed in sustaining the demurrer to these answers, for the reason that all the facts therein averred could have been given in evidence under the third and sixth paragraphs. After a careful examination of these several answers, we are inclined to adopt the contention of the appellee. There is no available error in sustaining a demurrer to one paragraph, if the facts therein alleged can be given in evidence under a paragraph remaining in the answer. *Darrell v. Hilligoss, etc., G. R. Co.*, 90 Ind. 264.

It is contended by the appellant that the finding of the

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circuit court is not sustained by the evidence. In support of this contention, it is claimed that there is no evidence in the record that James A. Stretch ever owned the land in dispute. The record upon this subject is very uncertain. The parties had it in their power to relieve this uncertainty by the introduction of the deeds in evidence, but this they did not do. There are some admissions in the record, as well as some recitals in the decree setting aside the deed to appellee, from which the court might have inferred that the title to this land was at one time in James A. Stretch.

The appellant also introduced in evidence a decree of the Grant Circuit Court in his favor against the appellee and James A. Stretch, quieting title, but no land is described in this decree. The complaint upon which it was based might have supplied this defect, but it was not read in evidence. A decree quieting title to land, unless the description can be ascertained from the record, is void.

We find no error in the record for which the decree of the circuit court should be reversed.

Judgment affirmed.

Filed March 7, 1889.

No. 13,620.

ALLEMAN v. HAWLEY ET AL.

PARTITION.—*Counter-Claim.*—*Time of Filing.*—*Practice.*—If a defendant in partition proceedings desires to set up a claim for improvements made and taxes paid, the better practice is to file his counter-claim when he files his answer, and not after a finding has been made on the issue joined on the complaint.

SAME.—*Sale and Distribution.*—The plaintiff in partition proceedings, where

117	532
127	455
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the real estate is found to be not susceptible of division, can not be required to pay the defendant for his interest in the property, or for improvements made or taxes paid by him thereon, as, in such case, it is the right of the plaintiff to have the real estate sold and his share of the proceeds distributed to him.

SAME.—*Improvements.—Taxes.*—Where the plaintiff in an action for partition is the owner of two-ninths of the property, exclusive of improvements made thereon by the defendant—who also sets up a claim for taxes paid—such plaintiff, upon the real estate being ordered sold as not susceptible of division, is entitled to receive from the commissioner two-ninths of the value of the real estate, exclusive of the improvements, less costs adjudged against him and less two-ninths of the taxes paid by the defendant on the real estate, exclusive of the improvements.

SAME.—*Improvements Made with Notice of Co-Tenant's Title.*—The right of a tenant in common to compensation for improvements made by him is not a legal right, depending upon a statute, but is a right enforceable in a court of equity, and the fact that the improvements were made after notice of the co-tenant's title will not defeat a recovery.

From the Marshall Circuit Court.

H. Corbin, J. D. McLaren and E. C. Martindale, for appellant.

A. C. Capron and S. Parker, for appellees.

BERKSHIRE, J.—This was an action in partition, brought by the appellees against the appellant.

The case was tried and the court found that the appellant and appellees were tenants in common of the real estate in question, and that the appellant's interest was seven-ninths, and the appellees' each one-ninth; that the property was not susceptible of division, and that the same ought to be sold and the proceeds of the sale divided among the respective parties according to their several interests.

After the foregoing finding had been made, with leave of the court the appellant filed a counter-claim asking that she be allowed for improvements which she had put upon the real estate, and for taxes paid by her on account of the same.

Issue was joined upon the counter-claim and the same submitted to the court, and, at the request of the parties, the court made a special finding.

The course of procedure followed in this case can not be held to be erroneous in view of former decisions of this court, but it is not to be commended.

The appellant should have filed her counter-claim when she filed her answer, then all the issues to be determined in the case could have been submitted to the court and tried at the same time. It is never satisfactory to try a case by piecemeal.

The appellant assigns a number of errors, but waives all except the fourth and fifth, which are: *Fourth*. The court erred in its conclusions of law. *Fifth*. The court erred in overruling appellant's motion for judgment upon the special finding in her favor for the value of improvements made and taxes paid by her, and for an order that these be first paid, and that the court fix a time within which payment should be made, and a time when payment should be made for the interest in the real estate as fixed by the court.

We may state now, as well as at any other time, that the court had no power to require that the appellees pay the appellant for her interest in the real estate or for improvements made and taxes paid by her. *Elrod v. Keller*, 89 Ind. 382; *Lane v. Taylor*, 40 Ind. 495; *Freeman Coten.*, section 509.

Had the property been susceptible of division, it would have been the right of the appellees to hold their interest in severalty; as it could not be divided, it was their right that the property be sold and their share of the proceeds distributed to them. Sections 1186 to 1208 inclusive, R. S. 1881.

The special finding does not state the facts very clearly, and, taken in connection with the conclusions of law and the decree of the court, the whole is somewhat ambiguous.

We summarize the facts as follows: The real estate is described as lot 55, in the city of Plymouth, and was conveyed to Ann E. Hawley by warranty deed from Moses A. Kidwell on September 24th, 1855; that the said grantee was the mother of the appellees and the widow of Edgar Hawley;

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that, after the execution of the said deed, Mrs. Hawley intermarried with Joel Parker, and died in the year 1883.

During the existence of said marriage, the said Ann E. Parker (Hawley) and Joel Parker conveyed the said real estate to William C. Edwards for a valuable consideration, who thereafter conveyed the same to the appellant for a valuable consideration, said last named conveyance having been made on the 15th day of March, 1869. At the date of their respective conveyances Edwards and the appellant were put in possession, and the latter has held exclusive possession to the present time; that the appellant has made valuable improvements upon said real estate to the amount of \$3,300, and that the improvements so made have enhanced the value of the real estate to the amount of \$3,300; that the value of the real estate without the improvements is \$700; that the appellant has paid town and city taxes against said real estate to the amount of \$240.85, and State and county taxes to the amount of \$461.16; the fair value of the rents and profits of the said real estate, without improvements, is nothing; with improvements, since the death of Mrs. Parker, \$18 per month; that the appellees are the owners in fee of an undivided one-ninth each of the said real estate; that the same is indivisible, and can not be divided without spoiling the whole lot; that the value of the appellees' interests in the said real estate, without improvements, equals \$155.55, and the interest of the appellant equals \$544.45, and that her improvements are of the value of \$3,300; that the said Edgar Hawley died intestate in April, 1855, and at the time of his death was living on said property with his family, and held a bond for a deed to said property from said Moses A. Kidwell; that no deed was executed by said Kidwell for said lot until after the death of said Hawley; that said Ann E. Parker was the guardian of the persons and estates of the minor children of the said Hawley, the appellees, and one other, Mary I. Hawley, and as such guardian, under the order of the Marshall Common Pleas Court, sold the undivided two-thirds of said

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real estate to the said Joel Parker, which sale was confirmed and the title thereby vested in him; that the said Edwards and the appellant had, at and before their respective purchases, only such constructive notice of said guardian's proceedings as was given by the records of the Marshall Common Pleas Court.

The conclusions of law are:

"First. That said lot 55 be sold.

"Second. That the proceeds of the sale be divided as follows: Seven-ninths to Julia A. Alleman, to which shall be added two-ninths of all taxes accrued since October, 1883, and which said Julia A. Alleman has paid, with six per cent. interest on this last item."

The proper exception was reserved to the conclusions of law, and thereafter the court rendered judgment that the appellees were the joint owners of the undivided two-ninths of said real estate, and the appellant the owner of the undivided seven-ninths thereof, and that the same be sold as lands are sold on execution, one-third of the purchase-money to be paid in cash, one-third in six months and the remaining one-third in twelve months from the date of sale.

It was further ordered that Samuel Parker be appointed a commissioner to make said sale, and when the proceeds were collected and costs paid in the manner therein directed, that the commissioner make distribution to the parties according to their several interests, except that the defendant should receive, in addition to her share, the amount of all taxes paid by her on said real estate since October, 1883.

From the facts found, and the conclusions of law and the decree rendered, it is impossible to tell whether, in making the distribution, it was the duty of the commissioner, after payment of costs and the amount to be paid to appellant on account of taxes paid by her, to pay to the appellees two-ninths of the remainder, or to pay to them \$155.55, less two-ninths of the whole amount adjudged to be due the appellant on account of taxes paid by her. Either conclusion is wrong.

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It is found that the real estate and improvements are worth \$4,000; the improvements, \$3,300, and the real estate, without the improvements, \$700.

The order should have been that the appellees were the owners of two-ninths of the real estate, as valued, independent of the improvements, and the appellant of the remainder, including the improvements, or that the appellees were the owners of $\frac{31}{800}$ of the property, with the improvements, and the appellant of $\frac{769}{800}$ thereof; that the real estate be sold, and that out of the proceeds of said sale $\frac{31}{800}$ of the proceeds thereof be paid to the appellees, less the costs adjudged against them, and less $\frac{31}{800}$ of the taxes adjudged to be due to the appellant, and that, after payment of the costs adjudged against the appellant, the remainder be paid to her.

The following authorities sustain this conclusion: *Carver v. Coffman*, 109 Ind. 547; *Elrod v. Keller*, *supra*; *Dean v. O'Meara*, 47 Ill. 120; *Kurtz v. Hibner*, 55 Ill. 514; *Moore v. Williamson*, 10 Rich. Eq. 323; 1 Story Eq. Jur., section 655; *Scott v. Guernsey*, 48 N. Y. 106; *Conklin v. Conklin*, 3 Sandf. Ch. 64; *Martindale v. Alexander*, 26 Ind. 104.

The improvements enhanced the value of the property \$3,300. Had the property been susceptible of division, and so situated that two-ninths of the lot could have been set off to the appellees, independent of the improvements, this would have been done. This is no longer an open question.

We can not imagine how the mere fact that the property was not susceptible of division can enlarge the interests or rights of the appellees, nor can we imagine how it would be inequitable to make distribution of the proceeds arising from the sale of the property, as we have herein indicated.

We do not think the question as to whether the appellant had notice of the appellees' title when the improvements were being made is one of importance. The appellant was a tenant in common with the appellees, and held by far

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the largest interest in the property, and had the right to make improvements, if made in good faith and for the betterment of the property.

But, independent of what we have stated, it appears from the special finding that the appellant paid a valuable consideration for the property, received her conveyance and made the improvements without any actual notice of the title or claim of the appellees.

The conclusion at which we have arrived is not in conflict with what is ruled in the case of *Bryan v. Uland*, 101 Ind. 477, referred to in the brief of counsel for the appellees.

That was a case where the Ulands successfully maintained an action against Bryan to quiet their title to certain real estate, and thereafter the latter sought compensation for his improvements, under the statute for the benefit of occupying claimants. In that case it appeared that Bryan and those under whom he claimed purchased the real estate and made the improvements with full notice of the rights of the Ulands. His proceeding necessarily failed, for the reason that the statute upon which his right to compensation depended, by its very terms, was limited in its operation to purchasers making improvements *in good faith*. Section 1074, R. S. 1881.

The appellant's right to compensation for her improvements is not a legal right, depending upon a statute, but is a right resting upon equitable principles, and one which a court of equity will enforce.

The judgment is reversed, and the court below is directed to render a decree in accordance with this opinion.

Judgment against the appellees for costs.

Filed March 7, 1889.

 Royse et al. v. Turnbaugh et al.

No. 13,343.

ROYSE ET AL. v. TURNBAUGH ET AL.

117	539
129	326
117	539
123	307
117	539
136	28

PLEADING.—*Demurrer.*—*Harmless Error.*—There is no available error in overruling a demurrer to an insufficient paragraph of cross-complaint, where no relief is granted the cross-complainant under that paragraph.

STATUTE OF LIMITATIONS.—*Quieting Title.*—An answer pleading the fifteen years statute of limitations in bar of a suit to quiet title to real estate is good.

SAME.—*Coverture.*—*Infancy.*—A reply of coverture to an answer pleading the statute of limitations in bar of a suit to quiet title is bad; so is a reply of the plaintiff's infancy when the cause of action accrued, marriage during non-age and continued coverture.

SAME.—*Adverse Possession.*—Neither a suit to quiet title nor an action for partition can be maintained by plaintiffs, the youngest of whom is thirty-five years old, where it appears that the defendants and their grantors have been in the exclusive and continuous possession of the real estate for more than twenty years, under a claim of title, as in such case both proceedings are barred.

SAME.—*Non-Residence of Plaintiff.*—*Running of Statute Against not Stayed.*—The running of the statute of limitations against a plaintiff is not stayed during the time he may be a non-resident of this State. *Smith v. Wiley*, 21 Ind. 224, overruled.

From the Washington Circuit Court.

S. B. Voyles and *H. Morris*, for appellants.

J. A. Zaring, *M. B. Hottel* and *J. R. Funk*, for appellees.

OLDS, J.—The appellants, the plaintiffs below, brought this action by first filing a complaint in one paragraph, alleging that they were the owners of certain real estate, describing the same; that the defendants were asserting title to said real estate, but that their claim was unfounded and wrongful, and constituted a cloud upon their title; prayer for a judgment quieting their title.

On this paragraph of complaint issues were formed, demurrers filed to pleadings, and exceptions reserved to the

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rulings of the court on the demurrers. After the case was at issue on this paragraph of complaint, a second paragraph of complaint was filed for partition of the real estate, being the same real estate described in the first paragraph. Upon the filing of the second paragraph, the parties, plaintiffs and defendants, entered into a written contract, which was filed in the cause, agreeing that all evidence which would be proper under any answer, cross-complaint or reply which might be filed should be admitted under the general denial, but expressly agreeing that no objection or exception taken and reserved in forming the issues on the first paragraph of complaint should be waived.

The exceptions taken to the rulings of the court were taken when there was no second paragraph of complaint on file, and are considered without any reference to the second paragraph.

The third paragraph of the pleading filed by the defendants is in the nature of a cross-complaint, and is demurred to as such, for the reason that it does not state facts sufficient to constitute a cause of action against the plaintiffs.

The plaintiffs claim title through, and as heirs of, one George W. Royse, deceased. The third paragraph of cross-complaint admits title to have been in Royse, and alleges that Royse, in 1851, sold the real estate to one Horner, who paid the purchase-price and took a bond from Royse by which Royse agreed to convey the same to Horner; that Royse became insane, and one McCrary was duly appointed guardian of said Royse; that Horner sold and assigned his bond for said real estate to Amos Bradberry, and said Bradberry brought suit against said McCrary, guardian, and said guardian appeared to said action, and such proceedings were had that the court ordered said guardian to convey said real estate to said Bradberry; that in pursuance of said order of the court, said guardian did convey said real estate to Bradberry, and Elizabeth Royse, wife of said George W. Royse, joined in said conveyance; that Bradberry sold said

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real estate, together with other lands, to James Turnbaugh, and Bradberry and wife, in 1861, executed to said Turnbaugh a deed intending to convey said real estate, but by mutual mistake of grantors and grantee to said deed, and of the scrivener drawing the same, said real estate described in the complaint was omitted; that Turnbaugh, in pursuance of said purchase, took possession of said real estate, immediately after said purchase and conveyance, as owner in fee simple, and held possession of the same until his death; that the defendant Jane Turnbaugh is the widow, and the defendant Samuel Turnbaugh is the son, of said James Turnbaugh, and that said defendants now hold possession of said real estate, and claim title to the same as the legal heirs of James Turnbaugh, deceased, and by purchase from his other legal heirs; that defendants, and those under whom they claim title, have paid the taxes on said real estate for twenty years, and have made improvements on said land to the amount of \$2,500. There is also an allegation that said Royse was notified of the pendency of said proceedings against his guardian. Prayer for the correction of the deed from Bradberry and wife to James Turnbaugh, and for judgment in behalf of the cross-complaints and for all proper relief.

This paragraph of cross-complaint seeks to show title in the defendants through George W. Royse by alleging facts which constitute a valid judgment and order, by the Washington Court of Common Pleas, for the conveyance of said real estate by McCrary, the guardian of Royse, to Bradberry, and a conveyance by said guardian to Bradberry, in pursuance of said order, which vested the title of said Royse in Bradberry, and afterwards a conveyance by Bradberry to James Turnbaugh. It is contended by counsel for appellees that the judgment was invalid, for the reason that it is not shown that Royse, the insane person, was served with process, and that it appears that McCrary, his guardian, voluntarily appeared, and that such appearance was unauthorized.

The rule is, that when it does not appear affirmatively that

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notice was not issued, but it does appear that jurisdiction was assumed and a final judgment rendered by a court of general jurisdiction, jurisdiction will be presumed. *Sims v. Gay*, 109 Ind. 501.

This case presents to some extent a different question than if the pleading was silent upon the question of the manner in which the court took jurisdiction, for the pleading attempts to set out the facts as to the manner in which the court took jurisdiction. But it is not necessary to decide the question. As will be hereafter seen, there was no substantial error committed, even if this paragraph was not sufficient to show a valid judgment, as the court finds against the appellees on the questions of service and the authority of McCrary to act as guardian, and no relief was granted appellees under this paragraph of cross-complaint.

The second error assigned is the overruling of the demurrer to the second additional answer. This paragraph of answer pleaded the fifteen years statute of limitations. This was a good answer to the only paragraph of complaint then in the case, which was to quiet title. *Caress v. Foster*, 62 Ind. 145; *Murphy v. Blair*, 12 Ind. 184.

The third error assigned is the sustaining of the demurrer to the first paragraph of appellant Butler's reply, which is a plea of coverture in reply to the second paragraph of answer, setting up the twenty years limitation. The demurrer was properly sustained. *Rosa v. Prather*, 103 Ind. 191.

The fourth error assigned is the sustaining of the demurrer to the third paragraph of reply of appellant Butler to the second paragraph of answer. This reply alleged that appellant was an infant at the time her cause of action accrued, that she intermarried with Mr. Butler before she arrived at the age of twenty-one years, and has ever since remained his wife. The reply was addressed to the second paragraph of answer, setting up the twenty years limitation as a bar to the action. This paragraph of reply was also bad, and the demurrer was properly sustained. *Richardson v. Pate*, 93 Ind. 423;

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Wright v. Wright, 97 Ind. 444; *Rosa v. Prather*, *supra*; *Wright v. Kleyla*, 104 Ind. 223; *Barnett v. Harshbarger*, 105 Ind. 410.

The fifth error assigned is in sustaining the demurrer to the fourth paragraph of reply, which is the same as the third paragraph of reply, and there was no error in the ruling.

The sixth error assigned is upon the conclusions of law stated by the court on the facts found.

The court found that George W. Royse, the father of the plaintiffs, was the owner of the real estate; that he was insane, and that his wife attempted to dispose of the real estate to one John S. Horner by written contract; that Horner assigned the contract to Bradberry; that Bradberry, in January, 1855, filed a petition in the Washington Court of Common Pleas, making one McCrary, as guardian of said Royse, defendant, in which petition Bradberry set up the execution of said contract for the sale of said real estate by said George W. Royse, and asked for an order directing and authorizing the guardian to convey the same to him; that McCrary entered an appearance to said action without the service of any process whatever, either upon himself or said George W. Royse; that McCrary was not the duly appointed guardian of Royse, nor had Royse been adjudged insane, but McCrary acted as such guardian at the request of Bradberry and the direction of the court; that an order was made in said cause by said court appointing McCrary commissioner, and ordering him to convey said real estate to Bradberry, which he did, in pursuance of said order; and Bradberry was put in possession of said real estate, and held possession of the same until he sold the same to James Turnbaugh; that said George W. Royse died in 1856 or 1857, intestate, and was, at the time of his death, of unsound mind; that he left surviving him his widow, Elizabeth, and the following named children: Joseph, Henry, Francis, George W. and Martha Royse; that Martha afterwards intermarried with William Butler; that the estate of George W. Royse, deceased, did

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not exceed \$300; that, on December 27th, 1860, the widow, Elizabeth Royse, Joseph Royse, Henry Royse and Francis Royse conveyed said real estate by deed of quitclaim to James Turnbaugh, and, on January 1st, 1861, Amos Bradberry and wife conveyed said real estate by deed of general warranty to James Turnbaugh, who took possession of said real estate, claiming to be the sole owner thereof, and held exclusive possession until his death; that said James Turnbaugh left surviving him said Jane Turnbaugh, his widow, and Samuel Turnbaugh, his son, and one of his heirs at law; that since the death of said James Turnbaugh the defendants and other heirs of said James Turnbaugh have been in the sole and exclusive possession of said real estate, claiming title thereto as the widow and heirs of said James Turnbaugh; that said James Turnbaugh, in his lifetime, and his heirs since his death, have made valuable and lasting improvements on said real estate, of the value of \$1,500; that neither of the plaintiffs has ever been in possession of said real estate; that George W. Royse, plaintiff, was born in May, 1846, and Martha Butler, plaintiff, was born in 1848; that Martha intermarried with William Butler, June 12th, 1863, and since her marriage has not been a resident of the State of Indiana.

Upon these facts the court stated as conclusions of law that the plaintiffs are not entitled to recover upon their complaint, nor are they entitled to have partition of said real estate.

These findings of facts show the defendants, and those under whom they claim title, to have been in the sole and exclusive possession of said real estate, claiming to be the sole owners of the same, from January 1st, 1861, up to the commencement of this suit, August 24th, 1885, over twenty-four years, and that the youngest of these plaintiffs arrived at the age of twenty-one years sixteen years before this suit was commenced. Under this state of facts the action was barred long before the institution of this suit. It is urged by counsel for appellants that appellant Butler, having been a non-resident of the State of Indiana since 1863, is not subject

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to, or bound by, the statute of limitations of this State. We can not concur with this theory.

The statute of limitations, section 293, R. S. 1881, is as follows: "The following actions shall be commenced within the periods herein prescribed, after the cause of action has accrued, and not afterward."

The sixth subdivision reads: "Sixth. Upon contracts in writing other than those for the payment of money on judgments of courts of record, and for the recovery of the possession of real estate, within twenty years."

Section 294 reads: "All actions not limited by any other statute shall be brought within fifteen years."

Section 297 makes an exception that "the time during which the defendant is a non-resident of the State or absent on public business shall not be computed in any of the periods of limitation."

This exception applies to a case where a person in this State has a cause of action against another, and the defendant against whom the cause of action exists leaves the State on public business or becomes a non-resident of the State, and afterwards comes back into the State again. In such case he may be sued, and the time he is absent shall not be computed in the period of limitation. If he had remained in the State, the plaintiff would have been compelled to bring his action within the period fixed by the statute, or be barred from recovery. If the defendant departs and becomes a non-resident, or is out of the State on public business, by his acts he puts the plaintiff where he can not bring his action. The plaintiff is not at fault, but the defendant, by his absence, puts the plaintiff in a position where he can not sue without going out of the State to the residence of the defendant, and in such a case the law extends the time in which suit may be brought. But this benefit and extension of time was not intended for, and can not be extended to, a plaintiff who, having a cause of action against a person in this State, leaves the State and becomes

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a resident of another, and afterwards returns and brings suit, and as a reply in avoidance of the statute of limitations says he was out of the State a certain number of years, which must be deducted from the time fixed for the limitation of the action. If this construction should be given the statute in an action for the possession of real estate, a person might hold exclusive possession of real estate, claiming to be the owner in fee simple, for sixty years or longer, and if the true owner has been a resident of another State during such time, or has not been a resident of this State during at least twenty years after his cause of action accrued, his right would not be barred. Such is not the language or spirit of the statute. The case of *Smith v. Wiley*, 21 Ind. 224, holding a contrary doctrine, is in direct conflict with the express terms and intent and purpose of the statute. It is evident that in passing upon the question in that case the language used in the statute was overlooked, and that case is overruled.

The facts, as found by the court, show conclusively that the plaintiffs' cause of action was barred, and that the defendants' possession and claim of ownership, coupled with those under whom they claimed, had ripened into an absolute title long before the commencement of this suit. There was no error in the conclusions of law as stated by the court.

By the findings of facts and conclusions of law it appears that no affirmative relief was granted appellees on the third paragraph of their cross-complaint, and even if there was error in the ruling on the demurrer addressed to it, which we do not decide, it was a harmless error. There were other pleadings under which the facts constituting a bar to the action, as found by the court, could be proven. The case was properly decided on the facts found, and the judgment should be affirmed.

Judgment affirmed, with costs.

Filed March 7, 1889.

March v. The State.

No. 14,786.

MARCH v. THE STATE.

CRIMINAL LAW.—False Representations.—Larceny.--Where one bargains for goods under an assumed name, paying only a part of the agreed price for the same—the contract providing that the title to the goods shall remain in the sellers until full payment is made—and immediately upon receipt of the goods ships them to a distant State and follows them there, these facts show a preconceived scheme to obtain possession of the goods, and feloniously appropriate them, and constitute a larceny.

SAME.—Larceny.—Trespass not Necessary to Constitute.—It is not necessary that there should be a trespass in order to constitute a larceny. Where a fraudulent device or scheme is resorted to for the purpose of divesting the owner of title and possession, the offence is larceny.

SAME.—Newly Discovered Evidence.—New Trial.—A defendant in a criminal case can not obtain a new trial, on the ground of newly discovered evidence, by producing a letter exculpating him from the charge, and swearing that it was written by a person by whom it purports to be signed.

From the Marion Criminal Court.

J. D. Hamrick and *R. S. Turrell*, for appellant.

J. L. Mitchell, *J. W. Holtzman*, *H. T. Tincher* and *J. A. Pritchard*, for the State.

ELLIOTT, C. J.—The appellant prosecutes this appeal from a judgment declaring her guilty of larceny.

She was tried and convicted under the name assigned her in the record, which is the name she assumed while in the city of Indianapolis, but it is not her true name. She is a resident of a town in a distant State. She first visited the store of *Born & Co.*, in Indianapolis, on the 7th or 8th day of March, 1888, and looked at some carpets and curtains, but did not then bargain for them. Either at that time or at another visit on the 15th, she told one of the salesmen that her name was *Mrs. D. F. Kennedy*; that she was from *Noblesville*, and had an income of \$150 per month; that her husband was a

117	547
138	188
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148	407
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155	559
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165	401
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167	318
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169	388

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stonemason and had leased house number 184 North Tennessee street, in Indianapolis. After looking at the carpets and curtains on the 7th or 8th of March, she went to Mrs. Hubbard, who lived at number 184 North Tennessee street, and asked her if she would allow Mrs. Kennedy to come there and help make the carpets, and stated that Mrs. Kennedy owned the carpets. When she bargained for the goods she directed that the bill should be made out in the name of Mrs. Kennedy, and executed the contract under that name. The contract provides that the title to the goods shall remain in the sellers until the goods are paid for; it shows that only part of the price was paid, and that they were to remain at number 184 North Tennessee street until full payment. The goods were delivered at that place on the 15th day of March. About an hour after they were delivered, the accused told Mrs. Hubbard that Mrs. Kennedy wanted them shipped to her house. The goods were put in a box and were placed in the hands of an express company on the afternoon of the 15th day of March. The box was directed to Carrie Dickson, Newton, Iowa. It was delivered at the house of the accused at that place, and she and her daughter, Carrie Dickson, were present when it was delivered. False statements were made by the accused to various persons regarding the manner in which she obtained the goods, and other matters connected with the transaction.

The facts support the inference that the accused formed a fraudulent scheme to steal the goods before she secured possession of them. It is, indeed, impossible to infer any other conclusion. Not only do the facts require this conclusion, but they warrant the further inference that the appellant had formed a felonious intent to deprive the owners of their goods and appropriate them to her own use before she began the negotiations which enabled her to obtain possession of them. The false statements made by her, the devices resorted to by her to deceive the owners of the goods, and the shipment of them to Iowa, so soon after she obtained pos-

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session of them, leave no room to doubt that she had pre-conceived a scheme to obtain possession of the goods and feloniously appropriate them. The case against her is clear. The felonious intent existed at the beginning. She meant from the first to feloniously carry away the goods, and to effect this purpose devised the artifices and tricks which enabled her to obtain possession of the property. The case is not within the border-land of conflict, but is within the domain of established law. *Grunson v. State*, 89 Ind. 533; *People v. Shaw*, 57 Mich. 403; *State v. Fisher*, 38 Minn. 378.

The owners of the property did not intend to transfer title, for they expressly stipulated that it should remain in them. They did not, in fact, intend to deal with the accused at all. They did not even intend to deliver possession of the goods to Mrs. Dickson or Mrs. Spaits, of Iowa, but to Mrs. Kennedy, of Indianapolis. There was, therefore, really no effective transfer of possession to the accused. *Alexander v. Swackhamer*, 105 Ind. 81. She fraudulently induced the owners to believe that they were negotiating with Mrs. Kennedy, and were delivering the goods to her, when, in fact, as the accused knew, there was no such person in existence.

The doctrine that there must be a trespass in order to constitute a larceny is an antiquated legal fiction, which had, at most, a very slender support from the authorities, and which is now thoroughly exploded. The better and sounder doctrine is, that, where a fraudulent device or scheme is resorted to for the purpose of divesting the owner of title and possession, the offence is larceny. The better reasoned cases authorize the conclusion that the filmy gauze which separated cases where there was a fraudulent device from those in which there was an actual trespass, no longer obstructs or obscures the judicial vision. A stronger and better rule has supplanted the one which gave force to a foundationless distinction and an unsubstantial abstraction.

Counsel assume that this is simply the case of a purchaser

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of goods on instalments disposing of the goods before paying for them ; but in this counsel are in error, as is evident from what we have already said in speaking of the artifices and false representations of the accused. Nor is this simply a case where the purpose of the accused was merely to obtain personal property without paying for it ; for here there were tricks and devices clearly indicating a preconceived intention to feloniously deprive the owners of their goods and appropriate them. The line which separates this case from a mere fraudulent purchase of goods, with intent to hold them without paying for them, is neither dim nor uncertain, for the facts clearly indicate a criminal intent. Intent, it is scarcely necessary to say, may be inferred ; indeed, it is almost always a matter of inference rather than of positive proof.

A defendant can not obtain a new trial on the ground of newly discovered evidence solely by producing a letter exculpating him from the charge, and swearing that it was written by a person by whom the letter purports to be signed. If the rule were otherwise, justice might readily be defeated by the defendant himself manufacturing testimony. Doubtless facts might be added which would make a case for a new trial, but such facts are not present here. The letter referred to in the appellant's affidavit would not be admissible in evidence, and there is no sufficient showing that the testimony of the alleged writer can be obtained.

The verdict is well supported by the evidence.

Judgment affirmed.

Filed March 7, 1889.

Johnson v. Barrett *et al.*

No. 13,285.

JOHNSON v. BARRETT ET AL.

SUBROGATION.—Mortgage.—Judgment.—Satisfaction.—False Representations.—

Husband and Wife.—Where a husband and wife execute a mortgage upon the former's real estate, which is subsequently conveyed to the wife, who dies shortly after a judgment of foreclosure is rendered, leaving her husband and children surviving her; one who, at the solicitation of the husband, and upon his representation that the title is in him, and without any actual notice to the contrary, pays the amount of the judgment rendered upon the mortgage and causes satisfaction to be entered, and takes from the husband a new note and mortgage for the amount so advanced, is entitled, upon ascertaining the facts, to have the satisfaction of the judgment set aside, and to be subrogated to all the rights of the prior mortgagee, without regard to the solvency or insolvency of the mortgagor.

From the Posey Circuit Court.

W. P. Edson and *E. D. Owen*, for appellant.

A. P. Hovey and *G. V. Menzies*, for appellees.

NIBLACK, J.—Complaint by James N. Johnson against George M. Barrett, Ollie G. Barrett, Nellie H. Barrett, Carl E. Barrett, Ellen Barrett and Louisa Barrett, in four paragraphs.

The first two paragraphs sought to have a deed made by the defendant George M. Barrett to his wife, Mary L. Barrett, on the 4th day of January, 1882, for a tract of land in Posey county, set aside, on the ground that such deed was fraudulent and void as against the plaintiff.

The third paragraph sought to have the deed referred to declared and adjudged to have been only a mortgage.

The fourth paragraph charged that, on the 18th day of January, 1881, George M. Barrett and Mary L. Barrett, his wife, executed to James A. Cooper a mortgage on a particularly described tract of land, being the same tract named in the preceding paragraphs, to secure the payment of the sum

117	551
130	296
117	551
129	347
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143	97
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147	423
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150	496

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of \$3,000 ; that afterwards, on the 4th day of January, 1882, the said George M. Barrett conveyed the same land to his said wife, Mary Barrett, and caused the deed conveying the same to be duly recorded in the recorder's office of Posey county ; that in January, 1884, Cooper obtained a judgment on the indebtedness which the mortgage was given to secure, for the sum of \$3,969, and a decree foreclosing the mortgage and ordering a sale of the mortgaged lands ; that on the 24th day of February, 1884, the said Mary L. Barrett died intestate, leaving the said George M. Barrett as her husband, and the other defendants as her children, and all of them as her only heirs at law, surviving her ; that the said George M. Barrett thereafter requested the plaintiff to pay off and discharge the judgment and decree of foreclosure rendered against him, as above stated, and to take from him a new note and another mortgage on the same land to secure the repayment of the amount which would be required to pay off and discharge such judgment and decree ; that the plaintiff, in response to such request, proposed that if there was nothing against said land, except said judgment and decree of foreclosure, and his title to the land was good and perfect, he, the plaintiff, would pay off and discharge such judgment and decree, and take a new note and another mortgage ; but that if anything had intervened since the execution of the mortgage to Cooper, which in any way might affect his, the said George M. Barrett's, title to the land, he, the plaintiff, would take an assignment of the judgment and decree ; that the plaintiff, continuing, made diligent and particular inquiries of him, the said George M. Barrett, whether his title to the land was clear and complete, and whether any incumbrance other than the Cooper mortgage had been placed upon the land ; that, in answer to these inquiries, the said George M. Barrett falsely, fraudulently and corruptly assured the plaintiff that his title was clear and complete, and that there were no incumbrances subsequent to the execution of the Cooper mortgage ; that, relying upon such

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assurances, and believing them to be true, the plaintiff did not make any further inquiry or examination as to the title of the land, and did not take an assignment of the judgment and decree in favor of Cooper, as he would have otherwise done; that, for the same reason, he, the plaintiff, as he had contingently proposed to do, took a new note and another mortgage on the land included in the Cooper mortgage and the decree of foreclosure, to secure the payment of such note; that afterwards, on the 1st day of May, 1884, the plaintiff, in pursuance of his agreement with the said George M. Barrett, paid to Cooper the amount due upon his judgment and decree of foreclosure, including interest and costs, and caused such judgment and decree to be receipted and released, and to be discharged of record. Wherefore the plaintiff prayed that the release and satisfaction of the judgment and decree in favor of Cooper, entered of record as above set forth, should be set aside and vacated, and that he might be subrogated to all the rights which Cooper had held in such judgment and decree, upon his surrendering for cancellation the new note and subsequent mortgage executed to him by George M. Barrett.

A demurrer was sustained as to the first paragraph of the complaint, and the fourth paragraph was held to be insufficient upon demurrer as against all the defendants other than George M. Barrett, who were minors, and who appeared by a guardian *ad litem*. Upon the issues joined on the second and third paragraphs there was a finding and a judgment for the defendants.

The only question made in argument here is upon the sufficiency of the fourth paragraph of the complaint. The objections urged against the sufficiency of that paragraph are, first, that, upon the facts alleged, George M. Barrett had no authority to enter into any contract concerning, or to execute to the plaintiff a mortgage upon, more than one-third of the tract of land in controversy; and, secondly, that there was no allegation that George M. Barrett was insolvent, and that

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consequently the plaintiff had no other remedy against him than that of subrogation to the Cooper mortgage.

Subrogation is the substitution of another person in place of a creditor, so that the person substituted will succeed to all the rights of the creditor having reference to the debt due him. It is independent of any merely contractual relations between the parties to be affected by it, and is broad enough to include every instance in which one party is required to pay a debt for which another is primarily answerable, and which, in equity and good conscience, ought to be discharged by the latter.

Where a mortgage is executed to raise money to discharge a prior incumbrance, and the money is so applied, the mortgagee becomes entitled to be subrogated to the rights of the prior incumbrancer when such a subrogation is made necessary for the better security of his mortgage debt. *Gilbert v. Gilbert*, 39 Iowa, 657.

When a person has been required to pay, and has accordingly paid, a mortgage executed by another, he is entitled to be subrogated to the rights of the mortgagee, and to be treated as the assignee of the mortgage, notwithstanding the mortgage itself may have been cancelled and the mortgage debt discharged. In such a case the payment of the mortgage debt will operate as a discharge of the mortgage, or in the nature of an assignment of it, as may best serve the purposes of justice and the reasonable intent of the parties most interested. This right of subrogation does not depend upon the insolvency of the mortgagor. The mortgagee has the right to enforce, or foreclose, his mortgage, without regard to the solvency or insolvency of the mortgagor, and in that respect the person subrogated succeeds to all the rights of the mortgagee. Sheldon Subrogation, sections 1, 2, 3, 4, 11, 12, 13, 24 and 44.

The conveyance made by George M. Barrett to his wife was subject to all the equities which may have existed between him and her, as well as between him and his creditors,

Johnson v. Barrett *et al.*

and also to the Cooper mortgage, which both had executed, and with the payment of which he was presumably chargeable. *Brookville Nat'l Bank v. Kimble*, 76 Ind. 195.

His relations to this mortgage were not changed by the death of his wife. While continuing to occupy these relations to the mortgage, he arranged to have it paid by the execution of a junior, and partially ineffectual, mortgage to the plaintiff on the same property. Justice, therefore, requires that the plaintiff shall be subrogated to the rights of Cooper in the mortgage of which his, the plaintiff's, money was applied in payment. This is especially so, as thereby no injustice will be inflicted upon the children of Mrs. Barrett. Such a subrogation will place them in no worse a condition than they occupied before the Cooper mortgage was discharged, and hence will afford them no just cause of complaint.

The case intended to be made by the paragraph of complaint under consideration would have been better stated if there had been a direct averment that the plaintiff had no actual knowledge of the existence of the conveyance from George M. Barrett to his wife at the time he paid and discharged the Cooper mortgage; but the reasonable inference from what is alleged is that he had no such knowledge, and that he failed to make that diligent inquiry which would have led to actual knowledge of such conveyance, on account of material and misleading representations made to him as charged.

The judgment is reversed, with costs, and the cause is remanded for further proceedings not inconsistent with this opinion.

Filed Dec. 21, 1888; petition for a rehearing overruled March 8, 1889.

Keller v. The B. F. Goodrich Company.

No. 14,370.

KELLER v. THE B. F. GOODRICH COMPANY.

TRADE-MARK.—Infringement.—Injunction.—A label containing the words "Non-Secret Dental Vulcanite, made according to our analysis of the Akron Dental Rubber"—the last three words being printed in a different colored ink from the rest of the label, with large type, and conspicuously displayed—is an infringement upon a trade-mark containing the words "The Akron Dental Rubber," and injunction will lie to prevent its use.

SAME.—Intent to Deceive.—Presumption.—Where a trade-mark is used for the purpose of securing a benefit at the expense of its owner, and is not used in good faith for the purpose of explanation or information, the just presumption is that the person so using the trade-mark intends to deceive, and that he will probably succeed in his purpose, and the courts will restrain such use.

SAME.—Similitude in Substantial Parts.—When the similitude is in the substantial parts of a trade-mark there is an infringement, and an evasive attempt to hide the similarity, or a colorable explanation, which appears to be made for the purpose of escaping the effect of a wrongful use of the trade-mark, will not defeat the owner's right to an injunction.

SAME.—Evidence.—Quality of Articles.—In a contention as to the infringement of a trade-mark, evidence as to the quality of the articles manufactured by the respective parties is not material.

TORT.—Action for.—Defence.—Set-Off.—Counter-Claim.—An independent tort can not be made a defence against another tort, either by way of set-off or counter-claim.

DEPOSITION.—Contumacious Witness.—Coercion and Punishment.—Where a witness under examination before an officer not having power to punish for contempt refuses to answer a proper question, the officer should report to a court having jurisdiction, and ask it to compel an answer or punish the contumacious witness. The deposition can not be suppressed on that account.

SAME.—For Use in Other State.—Assistance of Courts.—The courts of the State where a deposition is taken to be used in another State, will exercise their authority, when appropriately invoked, to secure competent testimony, and will assist an officer within their jurisdiction, when assistance is properly asked, to secure answers to competent questions.

From the Allen Circuit Court.

R. S. Robertson, for appellant.

W. P. Breen, R. C. Bell and S. L. Morris, for appellee.

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ELLIOTT, J.—The appellee is and long has been engaged in the manufacture and sale of an article used in dentistry, and the trade-mark, printed upon each box or package, is "The Akron Dental Rubber." The appellant is engaged in the same line of business, and manufactures and sells an article which he claims is the same as that manufactured and sold by the appellee. He puts the articles in boxes of a different shape and material from those used by the appellee, and has printed on them these words: "Non-Secret Dental Vulcanite, made according to our analysis of the Akron Dental Rubber." The words preceding the words "Akron Dental Rubber" are printed in black ink and large type. The words "Akron Dental Rubber" are printed in red ink, the type is large and the words are prominently displayed. They are so printed and arranged as to readily and quickly catch the eye. They are followed by the formula for the preparation of the article, also printed in red ink, but in very small type.

The contention of the appellee, which prevailed below, is, that in using the words "Akron Dental Rubber," as the appellant did, he infringed its trade-mark; the appellant, on the other hand, contends that there was no infringement because the label used by him does not assert that the article is the "Akron Dental Rubber," but informs the public that it is a non-secret vulcanite, manufactured according to an analysis of the "Akron Dental Rubber," and that the similarity is not such as is likely to mislead.

We should, perhaps, be able to sustain the views of the appellant's counsel if it were not that the words constituting the appellee's trade-mark are printed in colors that attract attention at once, and are so prominently displayed as to catch and hold the eye.

What should be the rule where the use of a trade-mark is made by a rival in business of the owner of the mark for the simple purpose of apprising the public that his (the rival's) article is manufactured from the same formula as that used

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by the owner of the trade-mark, and this information is so given as to fairly indicate that the words are in good faith used solely for the purpose of imparting information, we need not inquire or decide, for we are satisfied that it must be adjudged that the appellant has not so used the words constituting the trade-mark of the appellee as to indicate that he employed them in good faith, and for the sole purpose of informing dealers that the article is prepared according to the formula used by the appellee. The manner in which the words that form the appellee's trade-mark are printed is such as to make them very conspicuous, thus indicating the purpose of the appellant to reap some advantage from the trade-mark, and not merely to impart information. If the object had been to impart information simply, it is evident that no such prominence would have been given those words. As a matter of law, the judgment must be that the words, as used and printed by the appellant, are likely to mislead dealers, and that they indicate the purpose of the appellant to secure an advantage from the use of the words constituting the trade-mark. Adjudging, as we do, that this effect must be attributed to the mode of printing and displaying the trade-mark, we can not avoid the conclusion that the appellant has invaded the rights of the appellee.

The words so prominently displayed are not simply words of similar sound and meaning as those chosen by the appellee, but they are the identical words. It is true that other words are associated with them, but the words of the trade-mark are so prominently displayed, arranged and printed as to make it appear that they designate the article contained in the box or package, thus indicating that they were used for the purpose of conveying information as to the composition of the article manufactured by the appellant. The trade-mark is given the prominent position, and the other words are placed in subordinate ones. It is easy to perceive that the words "Akron Dental Rubber" might well be taken as designating the article sold by the appellant, and thus de-

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ceive purchasers. As we have shown, the purpose of the appellant in so conspicuously displaying the trade-mark adopted by his competitor, was not to enable him to explain the method of manufacturing the product he offered for sale, and as this was not his purpose, the only reasonable hypothesis upon which his conduct can be accounted for is, that his purpose was to secure an advantage from the use of his rival's trade-mark. Either his purpose was to explain, or it was to wrong his competitor; it was not his purpose to explain, and, therefore, it must have been his purpose to do injury to his competitor.

As it was the purpose of the appellant to do wrong, it is the duty of the courts to prevent its accomplishment, since to do otherwise would be to permit a wrong-doer to secure an advantage from his own wrong. This conclusion, with all its necessary incidents, results when it is affirmed that this was the appellant's purpose, and if that was his purpose, he should not be permitted to persist in a course that may probably result in loss to his competitor or in the deception of others. Where it appears that a trade-mark is used for the purpose of securing a benefit at the expense of its owner, the person who uses it must be presumed, unless the contrary appears, to intend to deceive dealers, and if this intention does appear, or is to be presumed, it should be held that what is intended will probably result. Where, therefore, it appears that the trade-mark was used to secure benefit to the user at the expense of the owner, and that it was not simply used in good faith for the purpose of explanation or information, the just presumption is that the person so using the trade-mark intends to deceive, and that he will probably succeed in his purpose. This being true, the courts should restrain him from persisting in his wrong.

It is difficult, if not impossible, to deduce any general rule from the decisions under which a particular case can be placed. As held by Mr. Justice BRADLEY, in *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. Rep. 94, "each case must be de-

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terminated on its own circumstances." It was held in that case that the defendant, by employing the words "Cellonite Manufacturing Company," infringed the trade-mark "Celluloid Manufacturing Company," the court saying, among other things, that "Similarity, not identity, is the usual recourse when one party seeks to benefit himself by the good name of another. What similarity is sufficient to effect the object has to be determined in each case by its own circumstances. We may say, generally, that a similarity which would be likely to deceive or mislead an ordinary unsuspecting customer is obnoxious to the law."

In *Wotherspoon v. Currie*, L. R. 5 H. L. 508, the labels are set forth, and an inspection of them clearly shows that the infringement was not so clearly apparent as in the case before us, yet it was held that the complainant was entitled to an injunction. There is one passage in the opinion in that case which so forcibly applies to the present that we quote it: "There is," said the Lord Chancellor, "a passage in the respondent's answer in which he says: 'There is no reason in the world why I should take the name, because I manufacture something superior, and at a cheaper price, therefore why should I take the name of the plaintiffs?' Well, then, one naturally asks, why should he do anything to lead people to suppose that his name is to be in any way associated with Glenfield, or this inferior article (as he says) with his." So may we ask here, why should the appellant, doing business in Fort Wayne, Indiana, do anything to associate his name with Akron, in the State of Ohio? The natural presumption is that he expected to derive benefit from it, and secure buyers from among those who had bought and used the Akron dental rubber. If we may assume, as we justly may, that he intended to mislead, and not in good faith to convey information, we must carry this assumption to its logical consequences, and assert that his act was likely to accomplish what he intended it should.

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The case from which we have quoted is approved and followed in *Johnston v. Ewing*, Law Rep. 7 App. Cas. 219, and of it the court said: "In the Glenfield Starch Case, *Wother- spoon v. Currie*, the difference between the two labels was very obvious to the eye, even upon the most cursory inspection; and they were both intended for markets where the English language (in which they were throughout written) was understood. But the use of the characteristic word 'Glenfield' was enough for the purposes of deception."

The labels used by the opposing parties appear at full length in *Metcalf v. Brand*, 5 S. W. Rep. 773, and the similarity between them was not so great as between the labels before us, yet an injunction was awarded. We collect and cite, without comment, other cases which support our conclusion: *Siebert v. Findlater*, L. R. 7 Ch. Div. 801; *McAndrew v. Bassett*, 10 Jurist, N. S. 550; *Newman v. Alvord*, 51 N. Y. 189; *Edelsten v. Edelsten*, 1 De G. J. & S. 185; *McCartney v. Garnhart*, 45 Mo. 593; *Partridge v. Menck*, 2 Barb. Ch. 101.

We conclude this branch of the case by affirming that where the similitude is in the substantial parts of a trade-mark there is an infringement, and that an evasive attempt to hide the similarity, or a colorable explanation which appears to be made for the purpose of escaping the effect of a wrongful use of the trade-mark, will not defeat the owner's right to an injunction.

It is settled upon sound principle that an independent tort can not be made a defence against another tort, either by way of set-off or counter-claim. *Standley v. Northwestern M. L. Ins. Co.*, 95 Ind. 254; *Terre Haute, etc., R. R. Co. v. Pierce*, 95 Ind. 496; *Sterne v. First National Bank*, 79 Ind. 560; *Washburn v. Roberts*, 72 Ind. 213; *Shelly v. Vanarsdollar*, 23 Ind. 543; *Lovejoy v. Robinson*, 8 Ind. 399; *Conner v. Winton*, 7 Ind. 523. The decisions are harmonious, and they

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are right. The rule they declare supports the ruling of the trial court upon the appellant's counter-claim.

Corson, one of the witnesses for the appellee, after having testified that the article manufactured by the appellant was inferior to that manufactured by the appellee, was asked whether the formula from which it was prepared was not the same as that used by the appellant, and he declined to answer, because to answer would be to reveal a trade secret. The appellant moved to suppress the entire deposition of the witness. The rule for which appellant contends would result in punishing the party, and not the witness, and the modern rule in analogous cases is not to make the party suffer, but to punish the contumacious witness. *State, ex rel., v. Thomas*, 111 Ind. 515, and authorities cited. We are not now prepared to assent to the views of appellant's counsel on this question of procedure; we are, on the contrary, inclined to the opinion that the rule of procedure is this: Where a witness under examination before an officer not having power to punish for contempt refuses to answer a proper question, the officer should report to a court having jurisdiction, and ask it to compel an answer or punish the contumacious witness. On the principle of comity, the courts of the State where a deposition is taken to be used in another State will exercise their authority, when appropriately invoked, to secure competent testimony, and will assist an officer within their jurisdiction, when assistance is properly asked, to secure answers to competent questions. We doubt very much whether the witness was, in any event, bound to answer the question, since an answer would have disclosed a trade secret. A manufacturer who has discovered a method of preparing a valuable article has a property in his discovery, and to compel him to make known his process might entirely destroy the value of that property. There are authorities affirming that a witness is not bound to disclose the trade secrets, but we do not decide the question of their applicability, as we have concluded that the question arising on the denial

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of the appellant's motion may be otherwise disposed of, and the appeal be adjudged not maintainable. Our judgment on this point is, that the evidence as to the quality of the articles manufactured by the respective parties was not material, and, if not material, its admission could not have harmed the appellant. It is not important which manufactures the better article, for, if the trade-mark of the appellee was valuable to him, the appellant had no right to use it. Whether his article was superior or inferior is, therefore, immaterial. Its superiority, if conceded, would not entitle him to invade his competitor's rights by appropriating his trade-mark. On this point the authorities are well agreed.

Judgment affirmed.

Filed Dec. 21, 1888; petition for a rehearing overruled Feb. 16, 1889.

117	563
133	443
117	563
159	632

No. 13,576.

THE CHICAGO, ST. LOUIS AND PITTSBURGH RAILROAD
COMPANY v. MEYER.

ATTACHMENT.—*Garnishment.*—*Wages of Employee.*—*Defence.*—*Duty of Employer to Make.*—*Liability Notwithstanding Judgment.*—*Railroad.*—A railroad company is not bound to make a defence for an employee in proceedings against him in another State in which it is summoned as garnishee, and its failure to do so does not render it liable to the employee for the wages in its hands, notwithstanding the judgment in the garnishment proceeding.

From the Cass Circuit Court.

N. O. Ross and G. E. Ross, for appellant.

F. Swigart, for appellee.

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Howk, C. J.—This suit was commenced by appellee, Meyer, before a justice of the peace of Cass county, to recover certain moneys alleged to be due him, as a laborer, from the appellant herein. Before the justice, appellee recovered judgment for the full amount of his claim. On appeal from such judgment, the cause was tried by the court below; and, at appellant's request, the court made a special finding of the facts herein, and thereon stated its conclusions of law. Over appellants exceptions to the court's conclusions of law, and its motion for a new trial, the court rendered the judgment for appellee from which this appeal is now here prosecuted.

In this court, appellant's learned counsel first insist, in argument, that the trial court erred in its conclusions of law upon the facts specially found. The facts so found by the court were substantially as follows:

1. The plaintiff was in the employment of the defendant, upon its railroad, in the months of April, May and June, 1886, and compensation for the services rendered in each month became and was due on the pay-day for that month, which was on the 19th day of the succeeding month.

2. The plaintiff performed labor in the month of April, amounting to \$29.25; in May, amounting to \$27.50, and in June, amounting to \$21.50, and altogether amounting to the sum of \$78.25.

3. On the 13th day of May, 1886, Herman Nathan and Leopold Strauss commenced their action in attachment before David J. Lyon, a justice of the peace of Cook county, in the State of Illinois, against Blazius Meyer, the plaintiff herein, to recover the sum of \$48.95; and the defendant, the Chicago, St. Louis and Pittsburgh Railroad Company, was garnisheed to appear before said court in said cause and answer as to its indebtedness to said Meyer. Said railroad company, on the 29th day of June, 1886, in answer to the garnishee summons in said cause, answered that it was indebted to said Meyer for services in the sum of \$40, and claimed for him that he was entitled to an exemption of \$50.

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Notice of the commencement and pendency of said proceedings was given said Meyer by publication, as required by the statute of the State of Illinois. On the 29th day of June, 1886, said defendant appeared for the plaintiff, by its attorneys, before said court in said cause, and filed the plaintiff's affidavit therein, as follows:

"STATE OF INDIANA, CASS COUNTY, ss:

"Blazius Meyer, being by me first duly sworn, according to law, upon his oath saith that he is a married man, the head of a family, and he resides with his family; that his said family are entirely dependent on his services for support; that he is a laborer, in the employment of the Chicago, St. Louis and Pittsburgh Railroad Company; that his earnings, in said employment, are less than \$50 per month and are necessary for the support of his family; that he has no other income, and his family consists of himself, wife and two children; and that said sum is exempt from execution, attachment and all other writs against him, and he claims it as such. (Signed) BLAZIUS MEYER."

At the time of the commencement and determination of said cause before said justice there was in force in said State of Illinois a statute of said State in these words, to wit: "The wages and services of a defendant, being the head of a family and residing with the same, to an amount not exceeding fifty dollars, shall be exempt from garnishment. In case the wages or services of such defendant, in the hands of a garnishee, shall exceed fifty dollars, judgment shall be given only for the balance above that amount."

Said Meyer, under said statute, was entitled to have said sum due him from said railroad company exempt from said attachment and garnishment proceedings. Said court had jurisdiction of the subject-matter of said proceedings, and of the persons of said Meyer and said railroad company, and said attachment and garnishee proceedings conformed to the provisions of the statutes of the State of Illinois. Afterwards, on the 29th day of June, 1886, a judgment was ren-

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dered by said court in said cause for the sum of \$40 against said railroad company and in favor of said Meyer, for the use and benefit of said Herman Nathan and Leopold Strauss. Said judgment has not been paid, but has been appealed from by said railroad company, as such garnishee defendant, to the circuit court of Cook county, Illinois, and is now there pending.

3½. During the months of May, June, July and up to the present time, the plaintiff herein was a married man, and was the head of a family, and resided with the same in Logansport, Cass county, Indiana.

4. On the 19th day of May, 1886, and on the same days of June and July thereafter, plaintiff demanded pay for his labor of defendant's paymaster, who informed plaintiff of said attachment and garnishee proceedings, and offered to pay him the excess due him over and above the forty dollars that defendant had answered in said proceedings in garnishment was due him, and plaintiff refused to receive any part unless the whole amount of his wages was paid him. Plaintiff's attorney's fees for prosecuting this action are worth \$25.

5. At the time of the institution of the proceedings in Chicago, Illinois, the defendant herein knew that the plaintiff was at the head of a family and resided with the same in Logansport, Cass county, Indiana.

6. After defendant had filed its answer in garnishment and the plaintiff's affidavit, defendant's attorneys made no further defence to the action, except to appeal from the judgment, as found in finding No. 3.

7. Plaintiff knew that the defendant was making the defence aforesaid.

Upon the foregoing facts the court stated the following conclusions of law :

" 1st. The amount due the plaintiff from the defendant was not, and is not now, subject to the garnishment proceedings of Nathan and Strauss.

" 2d. It was the duty of the defendant to make a *bona fide*

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defence to the garnishee proceedings, and for its failure to do so it is not protected.

"3d. The plaintiff is entitled to recover from the defendant \$78.25, without penalty or attorney's fees.

(Signed) "M. WINFIELD, Judge."

It is apparent, we think, from the facts specially found by the court in this case, that the judgment below can not be sustained if it can be correctly said that the court erred in holding as matter of law that "it was the duty of the defendant to make a *bona fide* defence to the garnishee proceedings, and for its failure to do so it is not protected." We are of opinion that the court below clearly erred in concluding as matter of law, upon the facts specially found, that it was the duty of the defendant herein to make any defence for the plaintiff, Meyer, *bona fide* or otherwise, to the garnishee proceedings in Cook county, Illinois. There were no facts found by the trial court which could justify an inference even that at the time of the institution of such proceedings in garnishment, and at all times since, Blazius Meyer was not and had not been a man of sound mind and mature years, and fully capable of interposing or causing to be interposed, at the proper time and place, every defence he had, or thought he had, legal or equitable, to such proceedings. Nor were any facts found by the court which would authorize the conclusion, whether of law or fact, that it was the duty of the defendant or of its attorneys, as such, to make any defence whatever for or on behalf of plaintiff Meyer to the proceedings in garnishment.

The court found as facts that defendant's attorneys appeared for the plaintiff and filed his affidavit in the suit in attachment in Cook county, Illinois, and further that such attorneys made no other defence to such suit except to appeal from the judgment therein. His affidavit so filed failed to show, and the court failed to find, that plaintiff Meyer had any other available defence to such suit in attachment except the one attempted to be stated in such affidavit, or, if he had

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such other defence, that he had ever informed "defendant's attorneys" of the nature and extent of such defence. The court found, as its seventh and last finding of fact, that "plaintiff knew that the defendant was making the defence" stated in his affidavit. Of course he knew that such defence was being made for him by "defendant," or its attorneys, and as it nowhere appears that he ever objected to the action of defendant or its attorneys in making such defence, it must be assumed that the defence was made for him with his consent, at his request and by his authority. But the court wholly failed to find that plaintiff Meyer ever requested or authorized "defendant" or its attorneys to make any defence for him, *bona fide* or otherwise, in such suit in attachment, except the one attempted to be stated in his affidavit.

Upon the case under consideration, as made by the court's special findings of facts, we are of opinion that it never became or was the legal duty of the defendant herein to make any defence whatever for plaintiff Meyer in such suit in attachment. It follows, therefore, that the court below clearly erred in its second conclusion of law above quoted, and that, as the judgment of the trial court is and must be rested upon this conclusion, the error is fatal, and requires the reversal of the judgment. But as the facts found specially by the court do not authorize the rendition of a judgment for the defendant herein, we can not remand the cause with instructions to enter such a judgment. *Shannon v. Hay*, 106 Ind. 589.

The judgment is reversed, with costs, and the cause is remanded for a new trial and for further proceedings, etc.

Filed Jan. 5, 1889; petition for a rehearing overruled Feb. 23, 1889.

Morgan *et al.* v. The State.

No. 14,349.

MORGAN ET AL. v. THE STATE.

CRIMINAL LAW.—*Renting Rooms for Gaming Purposes.*—*Evidence.*—For evidence considered and held sufficient to sustain a conviction for renting a room to be used for gaming purposes, see opinion.

SAME.—*Statutory Sufficiency of Evidence of Offence.*—*Province of Jury.*—*Constitutional Law.*—Section 1815, R. S. 1881, prescribing what shall be sufficient evidence that a place was rented for the purpose of gaming, is not unconstitutional as being in derogation of the right of the jury to determine both the law and the facts in a criminal cause, and it is, therefore, proper to instruct the jury in accordance with the terms of that statute.

SAME.—*Instruction to Jury.*—*Omissions.*—Where an instruction is correct as far as it purports to go, it can not be treated as erroneous because it does not go further and include some other proposition. It is only by asking a special instruction covering the omitted matter that a question can be reserved upon a failure of the court to instruct the jury upon it.

SAME.—*Disagreement of Jury.*—*Instruction as to.*—It is not error for the court to fail to instruct the jury, on its own motion, upon a contingency so remote as that involving their right to find one defendant guilty and disagree as to another.

From the Clark Circuit Court.

P. H. Jewett, A. G. Caruth and F. B. Burke, for appellants.
G. H. Voigt, Prosecuting Attorney, for the State.

NIBLACK, J.—The appellants, Sylvester Morgan and Sarah Morgan, his wife, were indicted for a violation of one of the provisions of section 2079, R. S. 1881, in having, for a period of time covering several weeks of the latter part of the year 1886, rented a room in the city of Jeffersonville to be used and occupied for gaming.

A jury found the appellants guilty as charged, assessing a fine of one hundred dollars against Sylvester Morgan and of ten dollars against Sarah Morgan, and, over exceptions, a judgment was awarded accordingly.

The first question made here is that the verdict was not

117	569
124	861
117	569
147	10
147	80

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sustained by sufficient evidence. It was shown by the evidence that the room referred to in the indictment was a part of a building owned by Mrs. Morgan and kept and used by her and her husband as a hotel; that, in July, 1886, the appellants leased the room in question to one Price, ostensibly to be used as a storage-room and a sleeping apartment; that before the close of that summer Sylvester Morgan was notified that gambling was going on in the room, to which he gave no attention; that, during the months of November and December, 1886, a faro bank was kept in the room, and that the place was regularly used as a gaming-house; that, during the months named, the room had the reputation of being a place kept and used for gaming purposes; that a considerable number of persons were in the habit of visiting the room, and that a man usually stood at the door who admitted only such persons as were regarded as desirable visitors. Other facts and circumstances were testified to which tended to show that the appellants had good reason to believe that gaming was suffered to be carried on in the room. *Graeter v. State*, 105 Ind. 271; *Pierce v. State*, 109 Ind. 535. We would not, therefore, be justified in holding that the verdict was not sustained by sufficient evidence.

Questions are also made upon certain instructions given to the jury at the trial.

Section 1815, R. S. 1881, provides that "It shall be sufficient evidence that any building or other place was rented for the purpose of gaming, if such gaming was actually carried on, and the owner or lessor thereof knew or had good reason to believe that the lessee suffered any gaming therein, and such owner or lessor took no sufficient means to prevent or restrain the same."

The circuit court accordingly instructed the jury that if gaming was actually carried on in the room, and the appellants knew, or had good reason to believe, that their tenant suffered such gaming to be so carried on, and took no sufficient means to prevent or restrain the same, these facts con-

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stituted sufficient evidence that the room had been rented to be used for gaming.

Counsel contend that the section of the statute above set out is inoperative and void in its application to a case like this, because it is in derogation of the constitutional right of the jury to determine both the law and the facts in a criminal cause.

We have no common law offences in this State. It is only such offences as are defined by some statute that are punishable as crimes or misdemeanors. As incident to the power of defining crimes and misdemeanors, and of declaring what shall constitute a criminal offence, our Legislature has always assumed to determine what shall, in certain cases, be deemed sufficient evidence of the commission of an offence, or of some criminal act necessary to be proven in a criminal prosecution, and this assumption has never, as we believe, been either questioned or antagonized by the courts. That body has so assumed to determine what shall be sufficient evidence in cases of rape, seduction, receiving stolen goods, obstructing highways, and in other cases which might be enumerated. There was, consequently, no error in giving the instruction to which we have referred.

The circuit court also instructed the jury that the appellants might have taken means to prevent or restrain their tenant from further using their room for gaming purposes, by causing certain particularly described legal proceedings to be taken against him, but concluded with the declaration that the court could not say that the appellants ought to have caused such proceedings to be instituted, because it was for the jury to determine whether the appellants had taken sufficient measures to exculpate themselves, within the meaning of the statute. We see no reason for holding that this instruction invaded the province of the jury, as is claimed, nor has any other material objection to the instruction been brought to our attention.

The court further told the jury that their verdict ought to

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be separate as to each appellant; that in the event they found the appellants guilty, they might assess a greater fine against one than the other; that they might, if they thought the evidence so required, find one of the appellants guilty and acquit the other.

The objection made to this instruction is, that it ought to have gone further and informed the jury that they might find one of the appellants guilty and disagree as to the other. This objection can not be sustained. In the first place, the instruction was substantially correct as far as it purported to go, and we have often held that an instruction correct in that respect can not be treated as erroneous because it did not go further and include some other kindred or pertinent legal proposition. It is only by asking a special instruction, covering the omitted legal proposition, that a question can, in such an event, be reserved upon a failure of the court to instruct on the omitted subject. Besides, it is not error for a court to fail, on its own motion, to instruct a jury on the subject of a contingency so remote as that which might incline them to find one defendant guilty of a criminal charge and to disagree as to the guilt of his co-defendant. *Betts v. State*, 93 Ind. 375.

The judgment is affirmed, with costs.

Filed Dec. 19, 1888; petition for a rehearing overruled Feb. 23, 1889.

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No. 11,823.

SPENCE ET AL. v. THE BOARD OF COMMISSIONERS OF OWEN COUNTY.

TENDER.—Verdict.—Waiver.—A plaintiff can not complain that a verdict in his favor is less than a sum tendered by the defendant, where he fails at the trial to introduce any evidence of the tender.

SAME.—Instruction to Jury.—A plaintiff can not complain of the failure of the court to instruct the jury to return a verdict in his favor for the amount of a tender which he contends was not well pleaded and of which no evidence was given to the jury.

CONTRACT.—Change in Work to be Performed.—Damages.—A party to a written contract can not recover damages resulting from a change in the work to be performed by him under such contract, when the change is made at his request and for his benefit.

SAME.—Extra Work.—Fault of Contractor.—A party who has contracted to construct abutments and piers for a bridge can not recover for extra work caused by defective coffer-dams unskillfully constructed by him.

SAME.—Construction of Written Contract.—Instruction to Jury.—An instruction imposing upon the jury the duty of construing a written contract, or giving them authority to do so, is erroneous.

PRACTICE.—Exclusion of Testimony.—Reserving Question Upon.—The exclusion of testimony can only be made available by asking some pertinent question of a witness on the stand, and, if objection be made, stating to the court what testimony the witness will give in answer to the question.

SAME.—Subsequent Introduction of Excluded Evidence.—Error Cured.—If evidence offered by the plaintiff in chief is excluded, but is afterwards introduced in contradiction of a witness for the defence and goes to the jury without any instruction limiting it to the matter of impeachment, its exclusion when first offered is a harmless error.

SAME.—Motion not Well Taken as a Whole.—There is no available error in overruling an objection or a motion which is not well taken as a whole.

INSTRUCTION TO JURY.—Inapplicability to Evidence.—It is not error to refuse to give an instruction where no evidence is before the jury to which it is applicable.

COSTS.—County Commissioners.—Appeal from Allowance by.—Repeal of Statute.—The provision of section 5771, R. S. 1881, that if a party appealing from an allowance by the board of county commissioners fails to recover more on the appeal than is allowed by the board, he shall pay the costs of the appeal, was not repealed by the act of 1879 (Acts 1879, p. 106).

SAME.—Immaterial Error.—Where the circuit court adjudges the costs as

117	573
126	57
117	573
150	390
117	573
153	608
117	573
154	685

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contemplated by the statute, the method by which it reaches that conclusion, whether by considering evidence of a tender or otherwise, is immaterial.

From the Owen Circuit Court.

J. C. Robinson, I. H. Fowler, J. H. Jordan and O. Matthews, for appellants.

W. Hickam, D. E. Beem and G. W. Grubbs, for appellee.

ZOLLARS, J.—Appellants filed a claim against Owen county, before the board of commissioners of that county. From an allowance in their favor they appealed to the Owen Circuit Court. Upon a change of venue the case was taken to the Morgan Circuit Court, from which court this appeal was taken. In that court appellants filed an amended complaint.

The first and second paragraphs are based upon a written contract with the board of commissioners of Owen county for the construction of abutments and piers for a bridge across White River, and allege a completion of the work and a refusal on the part of the county to pay the contract price. The seven paragraphs which immediately follow the second are based upon the same written contract.

The grounds upon which the plaintiffs ask a recovery, as stated in those paragraphs, in brief, and without being specific, are, that, according to the plans and specifications given to the bidders for the work for inspection, and according to the contract subsequently entered into by the plaintiffs and defendant, the plaintiffs were to erect 1,900 cubic yards of masonry, and place 500 cubic yards of riprap; that the masonry, without the consent of the plaintiffs, was reduced to 980 cubic yards, and the riprap increased to 1,500 cubic yards; that those changes deprived the plaintiffs of profits which they would have made, and made necessary expenditures which they would not otherwise have been required to make; that the defendant delayed the work to the damage of the plaintiffs; that, by the plans and specifications, the defendant represented that there was a rock upon which one of

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the piers could be made to rest ; that there was no such rock, but, on the contrary, there was quicksand where the rock was represented to be, and that the absence of the rock and presence of the quicksand destroyed profits which the plaintiffs would have made, and increased expenditures on their part.

The tenth paragraph is a common count for work and labor, materials and expenditures. The bills of particulars accompanying the paragraph show that the work and labor done, the materials furnished and expenditures made were in and about the construction of one of the piers mentioned in the other paragraphs, and on account of the work being stopped and delayed by the defendant.

The court below overruled a demurrer to the third paragraph of the defendant's answer. That ruling is assigned here as error.

It is contended by counsel for the plaintiffs that the answer is bad, because it purports to be an answer to the whole complaint and is but an answer to the first nine paragraphs. We have examined the answer carefully and critically, and are well satisfied that the objection thus urged is not well taken. No good purpose would be accomplished by setting out the answer in full, or saying more upon this branch of the case.

It is averred in the answer that before the commencement of the action the defendant paid to the plaintiffs —— dollars, which was all that was in any way due to the plaintiffs at the time the action was commenced, except the sum of \$171.

The leaving of blanks is an awkward and careless way of pleading, but in this case, taking all of the averments of the answer together, they amount to an allegation that \$171 was all that was in any way due to the plaintiffs from the defendant at the time the action was commenced.

The other objections urged to the answer have reference to the allegations of a tender made while the claim was pending in the commissioners' court. As the answer would be sufficient with all the averments in relation to a tender

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eliminated, it will not be necessary, in this connection, for us to consider the objections urged and argued by counsel.

Error is also assigned upon the overruling of appellants' motion for a new trial. It is contended, in the first place, that the amount of recovery assessed by the jury is too small. The jury returned a verdict for the plaintiff in the sum of \$171. Counsel for appellant contend that the verdict should have been for \$300, at least, as that was the amount tendered, and thereby admitted to be due. It is a sufficient answer here to observe, that there was no evidence at all given to the jury of any tender. The jury could act upon nothing except the evidence before them. Whatever weight or effect the tender ought to have in the final disposition of the case, if any tender was made, it must be clear that the verdict of the jury should not be overthrown, nor even called in question as being unsupported by the evidence, because there may have been evidence which was not brought forward at the trial.

Appellants' counsel further contend that a new trial should have been granted below, and that the judgment should now be reversed by this court, on account of an alleged error of the court below in excluding certain testimony. It is stated in a bill of exceptions that appellants "offered to prove as evidence in chief, by Reuben Galloway and other named witnesses, each of whom was a competent witness, and each of whom was called and offered as a witness for such purpose at the proper time," that while they, the appellants, were engaged in the doing of what they regarded as extra work, Galloway inquired of A. B. Fitch, who, they contend, was the engineer in charge of the work, and the agent of the county board, as to who was to pay for the extra work, and that he said: "Go on and do the work as I tell you, and we will make it all right with you." The bill further recites that the testimony was excluded.

It is contended on the part of appellants that the relations of Fitch to the county board were such that his statements

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and promises would bind it, and that, therefore, the testimony was competent. On the other hand, it is contended by counsel for appellee that Fitch had no authority to bind the county board, and that for that reason the offered testimony was incompetent. They further contend, that, if it should be conceded that the testimony was wrongfully excluded, the error was rendered harmless by a subsequent admission of the same testimony.

The record really presents no question as to the competency or exclusion of the testimony. It may be said here, as was said in the case of *Higham v. Vanosdol*, 101 Ind. 160, that it does not appear that any question was asked the witnesses and objected to by the defendant; nor does it appear what the witnesses would have testified to, or whether they would have testified to anything concerning the proposition which was made. It was said in that case, that the exclusion of testimony can only be made available by asking some pertinent question of a witness on the stand, and, if objection is made, stating to the court what testimony the witness will give in answer to the question proposed.

It may well be said here, too, as contended by counsel for appellee, that the subsequent admission of the testimony rendered harmless any error that there may have been, if any, in its exclusion.

Upon the cross-examination of Fitch by appellants' counsel he testified that Galloway did not ask him who would pay for the extra work, and that he did not say to Galloway, "Go on and do the work as I tell you, and we will make it all right."

Appellants then called their witnesses, who testified that, in response to the question by Galloway, Fitch said to him: "Go on and do the work as I tell you, and we will make it all right."

It is true that the testimony came in the way of a contra-

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diction of the testimony of Fitch, but it went to the jury just as fully as if it had been admitted in the first instance.

Where testimony is once excluded, and is afterwards admitted as impeaching testimony, the court, to be consistent, should limit it to the latter purpose by a proper instruction to the jury. That was not done in this case. The jury were in no way instructed that the testimony should be limited to any one purpose, and were left to give it such weight in the case as they might see fit. They, doubtless, considered it as bearing upon the merits of the controversy, just as they would have done had it been admitted in the first instance.

If the testimony was competent, a question we need not and do not now decide, it should have been admitted when first offered; but inasmuch as it finally went to the jury without any limit placed upon its application by an instruction of the court, we think the case falls within that section of the code which provides that the court must, in every stage of the action, disregard any error or defect in the proceedings which does not affect the substantial rights of the adverse party, and that no judgment can be reversed or affected by reason of such error or defect. Section 398, R. S. 1881; *Rawson v. Pratt*, 91 Ind. 9.

Appellants' counsel assail each and all of the instructions given by the court. First in the order of the argument is the second given at the request of the defendant. The substance of that instruction is, that if there was any change in the work, as described in the written contract, by the defendant, without the consent of the plaintiffs, they would be entitled to recover whatever damages they might have suffered by reason of such change; that, on the other hand, if changes were made at the instance and request of the plaintiffs, and for their benefit, they would not be entitled to damages by reason of such change. Clearly, a party to a written contract can not recover damages resulting from a change in the work to be performed under such contract, when such change is made at his request, and results beneficially to him.

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It is said that the instruction ignored the tenth paragraph of the complaint, which was a common count for labor and materials, and the admission of the amount due as made by the tender set up in the third paragraph of the answer. In answer to that, it is sufficient to say, in the first place, that the instruction related wholly to damages resulting from a change in the work described in the written contract. In the second place, the bill of particulars filed with the tenth paragraph of the complaint, as already stated, shows that the work and materials therein mentioned are such as were made necessary by the alleged change in the work, as set out in the other paragraphs. And in the third place, there was no evidence at all before the jury of any tender.

In their argument upon the third paragraph of the answer, counsel for appellants contend that no sufficient and legal tender is shown by the plea to have been made. They can not, therefore, with much propriety, insist that the court should have instructed the jury to return a verdict for the amount of a tender which they contend was not well pleaded, and of which no evidence was given to the jury. And finally, the instruction as given was correct, and if any further charge in relation to a tender could by any possibility have been proper, it was the duty of appellants to have asked it, and to have submitted such an one as they desired to be given.

It is contended on the part of appellants that their bid for the work was made upon a profile on file with the auditor, and that, therefore, that profile became a part of the contract. The contention on the part of appellee is to the contrary. There is evidence in the record tending to sustain the contentions of both sides as to the profile being on file with the auditor, and the relations of the bids to the same. Upon that branch of the case the court, in the third instruction asked by the defendant, charged the jury that, from the evidence before them, it was their duty to determine what constituted the contract entered into by the parties;

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that it was their duty to determine from the evidence whether or not the profile became a part of the contract; that, in order that the profile should become a part of the contract, it must have been attached to it, and marked as a part of the contract, or it must have been exhibited by the defendant at the time the contract was made, as the plan of the work to be done. The instruction, we think, is erroneous, for the reason that it gave to the jury authority to construe a written contract, and imposed upon them the duty of so doing. But the error was to the injury of the defendant and in no way prejudicial to appellants.

As we have seen, nine paragraphs of the complaint rest upon a written contract between appellants and the county board. Attached to, and as a part of, that contract, are full plans and specifications for the work. The answer admits the execution of that contract. All prior negotiations and agreements must be regarded as merged in the consummated written contract. That is the contract, and the only contract, between the parties, and its construction was a question of law for the court, and not for the jury. Whether or not the actions and declarations of the defendant in respect to any profile might form a basis for a reformation of the contract, is a question in no way before us, and about which we express no opinion. It is sufficient here, that no profile was, in any way, made a part of the contract.

We discover no valid objection to the fourth instruction given upon the request of the defendant.

The fifth instruction given upon the defendant's request was so favorable to appellants as to leave them no ground of complaint. If there is any just ground of complaint it is on the part of the defendant. Under it the jury might have determined what the contract was, and given it an interpretation, and also assessed damages in favor of appellants on account of a reduction of the amount of masonry without their consent.

We can discover no stipulation in the contract that the

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masonry to be constructed should consist of a specified number of cubic yards. There having been no rock or shale upon which to erect one of the piers, as the contract seems to have contemplated, may have resulted in the reduction of the cubic yards of masonry in that pier; but, as we have before stated, the contract does not otherwise provide for a definite number of cubic yards. It is said by counsel that appellants may have been entitled to recover extra pay because of the reduction of the amount of masonry, although such reduction may have been made with their consent, and that the instruction does not embrace such a right of recovery. If appellants had, or might have had, such a right of recovery, and the instruction was not full enough in that regard, their counsel should have submitted an instruction covering the point.

The eighth instruction given upon the request of the defendant is also objected to. We have examined the instruction carefully, and deem it sufficient to say that it was more favorable to appellants than they had a right to ask.

By the ninth charge, also asked by the defendant, the court did nothing more than to impose upon the plaintiffs the burden of proving what they alleged in their complaint.

The tenth instruction given at the request of the defendant should be considered in connection with instruction one asked by appellants. When thus considered it involves no inaccuracy or error that would justify this court in reversing the judgment.

As to the instructions given by the court upon the right of the jury to weigh the testimony and judge of the credibility of the witnesses, although they perhaps go to the verge of the correct rule, we can not say that they involve errors for which the judgment should be reversed.

By the fourth of the court's charges, the jury were correctly instructed that the plaintiffs could not recover for extra work caused by defective coffer-dams unskillfully constructed by them.

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The court refused instruction three asked by appellants, but gave it with a modification. The instruction related to the effect of a tender by the defendant. It is claimed that the court erred in refusing and in modifying the instruction. All that needs to be said here is, that there was no evidence of a tender before the jury, and hence no evidence to which the charge was applicable. It is not error to refuse an instruction in such a case.

There are still other objections made to some of the instructions, all of which we have considered carefully. We do not, however, think that it would be profitable for us to further extend this opinion in specifically pointing out such objections and stating in detail why we do not think that any of them is of such a serious character as to justify a reversal of the judgment. Looking to all of the instructions, we think that they fairly well presented the case to the jury.

The court below rendered judgment on the verdict of the jury in appellant's favor for \$171, and adjudged the costs of the action against them.

Appellants objected to the judgment for costs, and moved to modify and change it, so that all of the costs should be adjudged against the defendant.

Over their objection, and for the purpose, it is said, of determining the question of costs, the court heard testimony, adduced for the purpose of showing that prior to the appeal to the circuit court the defendant tendered to appellants, in full of all of their demand, \$300 in money, and the county auditor's receipt for all costs up to the time of the tender. Appellants' counsel contend that the court erred in adjudging the costs of the action against them, in hearing the testimony in relation to the tender, and in refusing to modify the judgment.

Their argument is, that the court had no right or authority to hear such testimony after the return of the verdict and the discharge of the jury, and that the testimony so heard did not establish a valid and legal tender.

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The statute governed the costs on appeal, and hence it is not material whether there was a tender or not, nor as to the methods by which the court reached the conclusion that the costs should be taxed against appellants.

The act of 1852 (R. S. 1881, section 5771) provides that, from all decisions for allowances by the county board, etc., an appeal may be taken within thirty days to the circuit court, and that if the appealing party do not recover more on the appeal than is allowed, he shall pay the costs of such appeal.

The section originally provided, also, that if a claim should be disallowed in whole or in part, the claimant might, at his option, bring an action against the county. That provision of the section was repealed by implication by the act of 1879. Acts 1879, p. 106. But that act did not repeal that portion of the section in relation to the costs on appeal; on the contrary, it was provided in that act that appeals might be taken to the circuit court "as now provided by law."

The act of 1885 (Acts 1885, p. 80) was passed after the judgment in this case was rendered, and hence could in no way affect it. That act is an amendment of the act of 1879, and contains a provision about costs, the same as that contained in section 5771, *supra*; but that is not sufficient to show that section 5771, so far as it relates to costs, was repealed by the act of 1879.

The cases of *State, ex rel., v. Board, etc.*, 101 Ind. 69, and *Board, etc., v. Maxwell*, 101 Ind. 268, decide nothing more than that the act of 1879 repealed so much of section 5771 as authorized a claimant to commence an action in the circuit court upon his claim being disallowed in whole or in part by the county board.

The county board in this case allowed upon appellants' claim \$300, which, of course, carried costs up to the time of such allowance. Appellants did not recover that much upon the appeal, and hence, under the statute, the costs upon the appeal should have been, and were, taxed against appellants.

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As to such costs the question of a tender becomes entirely immaterial.

The court, in adjudging costs against appellants, doubtless acted upon the assumption that the costs accrued in the commissioners' court, except as connected with the appeal, had been paid, and were no further to be considered.

If, however, it can be said that the judgment is broad enough to cover those costs, and that, as to them, appellants are entitled to relief, a reversal of the judgment would not follow.

Upon a proper record this court might order a modification of the judgment as to the amount of such costs. But the record is not in a condition to order such a modification. The only way by which the question could be raised below was by an objection to the judgment and a motion to modify it as to costs.

Appellants made an objection and a motion to modify, but both the objection and motion are too broad. By both the objection and the motion appellants asked that all of the costs, including those made upon the appeal, should be taxed against the defendant. It has been many times decided that there is no available error in overruling an objection or a motion where it is not well taken as a whole. See *Wolfe v. Pugh*, 101 Ind. 293.

After a patient examination of the record and the numerous questions discussed by counsel, we find no error which would justify us in overthrowing the judgment.

Judgment affirmed, with costs.

Filed Nov. 15, 1888; petition for a rehearing overruled Jan. 23, 1889.

Patton, Warden, v. The State, *ex rel.* McCann.

No. 14,405.

PATTON, WARDEN, v. THE STATE, EX REL. MCCANN.

MANDATE.—*Prison Warden.*—*Warrant for Fuel Purchased.*—The warden of a State prison may be compelled by mandate to draw a warrant for fuel purchased for the prison by his predecessor, it being the duty of the warden, under sections 6140 and 6141, R. S. 1881, to purchase fuel and pay for it by drawing a warrant.

SAME.—*Return.*—*Fraud.*—*Mistake.*—A return by the warden alleging that the claim was rejected by the directors of the prison because they adjudged that there were improper weights, mistakes in calculations and inferiority in the quality of the fuel, but not alleging that there actually was fraud or mistake, is bad.

From the Clark Circuit Court.

L. T. Michener, Attorney General, C. L. Jewett, H. E. Jewett and J. H. Gillett, for appellant.

A. G. Caruth and F. B. Burke, for appellee.

ELLIOTT, J.—In the petition for the writ of mandate which issued in this case, the relator averred that under an agreement with Andrew J. Howard, then the warden of the Indiana State Prison South, he sold and delivered to Howard, for the use and benefit of that prison, a great quantity of coal for fuel; that after the delivery of the coal he presented his account, verified by the affidavit of Matthew L. Huette, keeper of accounts of the prison, to James B. Patton, who succeeded Howard in the office of warden, and that he refused to draw his warrant for the amount due the petitioner. The alternative writ contains substantially the same statement. Patton's return is in four paragraphs. The first is a general denial. The second alleges that the appellee's account was presented to the directors of the prison; that they inspected it and refused to allow it in full, but ordered an allowance for part of it. The third paragraph alleges substantially the same facts as the second; the differ-

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ence between the two paragraphs is, that the third alleges that the directors heard evidence, and rejected the account because of improper weights, mistakes in calculation, and the inferior quality of the coal. The fourth paragraph simply alleges that the appellant was ready and willing to draw a warrant for the amount due the appellee. To the second and third paragraphs of the return the relator successfully demurred.

It will be noticed that the second and third paragraphs are based solely on the action of the directors, and that it is not alleged that there was any fraud or wrong on the part of the relator, nor is it averred that the coal was inferior or that the weights were incorrect, or that there was any mistake in the calculations. It is, it is true, alleged that the directors rejected the account for the reason stated in the third paragraph; but it is not alleged that there was in fact any wrong on the part of the appellee's relator, or any inferiority in the coal, or any mistake in the calculations, so that the controlling question resolves itself into this: Had the directors authority to reject the petitioner's claim? In our judgment they had no such authority.

Section 6140, R. S. 1881, reads thus: "The warden shall attend to the purchasing of all articles for the institution, clothing, provisions, medicines, materials for buildings and repairs—said materials to be manufactured in the penitentiary. He shall have charge of the whole operations of the institution, and shall be its executive officer. But no contracts shall be made wherein any of the directors or officers of the institution are interested."

It is provided in section 6141 that the warden shall pay to the treasurer of State all money that he receives, and that "all accounts for claims against the penitentiary, for salaries, provisions, clothing, medicines, repairs, buildings, fuel, etc., shall be drawn on the order of the warden, countersigned by at least one of the directors." These statutory provisions make it the duty of the warden to buy fuel and to pay for it by

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drawing a warrant. The duty to draw the warrant for fuel sold and delivered to the warden for the use of the penitentiary is not a discretionary one, but, on the contrary, is an imperative duty. As the duty is imperative, its performance may be coerced by mandate. The remedy adopted is the appropriate one.

We do not doubt that if the warden should discover that there was any fraud or mistake in a claim presented to him, he might reject it, or require the proper correction to be made. But there is no such case presented by the pleadings, for it is not averred that there was actually fraud or mistake. All that is alleged is that the directors so adjudged.

The appropriation act of 1885 does not repeal or modify the former statute in respect to the questions here involved.

There is evidence supporting the finding.

Judgment affirmed.

Filed Jan. 4, 1889; petition for a rehearing overruled Feb. 20, 1889.

No. 14,449.

WOLFE ET AL. v. McMILLAN.

CONTEMPORANEOUS WRITTEN INSTRUMENTS.—*Parol Evidence.*—*Admissibility of to Explain.*—When property is conveyed by husband and wife by warranty deed—there having been previous money transactions between the parties to the deed—and on the same day the grantee takes the promissory note of the husband, and executes to him a title-bond, agreeing to convey to him said land upon the prompt payment of said note, the deed, note, and title-bond do not absolutely constitute a mortgage, and parol evidence is admissible to show the real transaction between the parties to said instruments.

117	587
156	588
117	587
164	425
117	587
165	358

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EVIDENCE.—*Ignorance of the Law.*—*Proof of, When Not Admissible.*—Evidence is inadmissible to show that one was ignorant of the law in a certain matter, when it is not proposed to prove that the other party to the transaction made any misleading statements, or that he even had any knowledge of such ignorance.

VERDICT.—*When Court May Direct.*—If the plaintiff's evidence, with all the legitimate inferences which a jury might reasonably draw from it, is insufficient to sustain a verdict in his favor, so that the same, if returned, would have to be set aside, the court may properly direct a verdict for the defendant, without submitting the evidence to the jury; otherwise not.

From the Jefferson Circuit Court.

J. W. Linck, C. E. Walker, J. L. Wilson, C. A. Korbly
and *W. O. Ford*, for appellants.

A. D. Vanosdol and H. Francisco, for appellee.

COFFEY, J.—In the year 1873, the appellant Delphia A. Wolfe, who then was and still is the wife of the other appellant, Elihu Wolfe, became the owner in fee, in her own right, of the land involved in this suit. On the 10th day of February, 1882, she executed her note to Priscilla C. Wilson for six hundred dollars, due one year after date, and she and her husband executed a mortgage on said land to secure its payment. On the 27th day of February, 1883, the appellants executed their note to the appellee for the sum of one thousand dollars, due two years after date, and also executed a mortgage on said land to secure its payment.

The appellee took an assignment of the Wilson note and mortgage, and, after entering the same satisfied, and deducting the amount due thereon from the said one thousand dollar note, paid the residue to the said Elihu Wolfe. On the 19th day of March, 1886, the appellants conveyed said land to the appellee by warranty deed, and on the same day the appellee took the separate note of the said Elihu Wolfe for \$1,308.26, due on the 19th day of June, 1887, and executed to him a title-bond, agreeing to convey to him said land upon the prompt payment of said note according to the tenor thereof. No money passed between the parties at the time

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of the execution of the deed, and the amount of the note executed by Elihu Wolfe to the appellee was the amount due at its date upon the one thousand dollar note, together with the amount of taxes due on said land. Elihu Wolfe having failed to pay said note, or any part of the same, this suit was brought for the possession of said land, in the ordinary form of ejectment.

The appellants answered the complaint by a general denial.

The appellant Delphia A. Wolfe also filed a cross-complaint, in which she set out the above facts, and alleges that said mortgages were executed to secure the individual debts of her husband for borrowed money, and that the deed executed to the appellee was intended as a mortgage to secure said debts and to procure an extension of time for their payment. She prays that said mortgages and deed be declared void as to her, and that her title to said land be quieted.

She also filed a special answer to the complaint, but we deem it unnecessary to set it out.

The appellee filed a reply to the special answer and an answer to the cross-complaint, and the cause, being at issue, was tried by a jury, who returned a verdict for the appellee. Upon the rendition of judgment on this verdict, the appellants took a new trial, as of right, under the statute; and the appellant Delphia A. Wolfe, by leave of the court, filed an additional paragraph of cross-complaint, in which she avers the same facts set up in her former cross-complaint, and alleges in addition thereto that the deed to the appellee and the title-bond executed in connection therewith were drawn in the form of a conditional sale, which fact was concealed from her, and that, by the authority of the appellee, her husband represented to her that said deed was made to avoid the costs of a foreclosure, and that appellee would execute back to her, or to her and her said husband, a title-bond, and would give them fifteen months' longer time in which to pay said debt.

The appellee filed a general denial to this cross-complaint,

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and the cause, being again at issue, was submitted to a jury for trial. The jury returned a verdict for the appellee.

The appellants filed a motion and reasons for a new trial, which were overruled by the court, and the appellants excepted. The court then rendered judgment on the verdict in favor of appellee for the possession of the land in controversy and damages for the detention thereof.

The only errors properly assigned in this court are, that the court erred in overruling the motion for a new trial, and that the court erred in overruling the demurrer of the appellant Delphia A. Wolfe to the special answer of the appellee to her cross-complaint.

As to the last error assigned, it is sufficient to say that the same has been abandoned by the appellants in this court.

It remains to inquire as to whether the court erred in overruling the motion for a new trial.

It is contended by the appellants that the deed executed by them to the appellee on the 19th day of March, 1886, the note executed by Elihu Wolfe to the appellee, and the title-bond executed by the appellee to the appellant Elihu Wolfe, when taken together, conclusively constitute a mortgage, and that parol evidence can not be admitted to prove that they were intended as a conditional sale.

On the other hand, it is contended by the appellee that these instruments of writing, when construed together, constitute a conditional sale, and that evidence is admissible to show the real transaction, in order that the court or jury trying the cause may determine whether the transaction was in fact intended as a sale or as a mortgage.

Each case involving questions of the kind now under consideration must be determined according to the circumstances surrounding it. If the transaction, taken as a whole, resolves itself into a mere security for a debt, it is a mortgage; and while it is true that each case is to be determined by the distinguishing facts which surround it, there are certain well settled principles by which the courts are bound. In the

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case of *Voss v. Eller*, 109 Ind. 260, the law upon this subject is stated thus: "A recognized method by which to determine whether a deed, absolute on its face, may nevertheless operate as a mortgage, is to ascertain whether or not at the time of its execution, there was a pre-existing or concurrently created debt by way of loan, owing to the grantee, the subsequent payment of which, in pursuance of a contemporaneous agreement, entitled the grantor, or debtor, to a reconveyance of the estate. An absolute conveyance without any other consideration than that assumed, coupled with an agreement to reconvey, will be regarded as a mortgage.

"Whatever form the transaction may have assumed, if the relation of debtor and creditor, with its reciprocal rights, continues between the contracting parties, or if such relation was then created, by loan or advance, and if the agreement, whether in the deed or in a separate instrument concurrently executed, is such that the debtor, by merely paying his debt, becomes entitled to insist upon a reconveyance, or to otherwise defeat the estate conveyed, the conveyance will be regarded as a security for such continuing or newly incurred debt."

The rules as here announced are supported by a long and unbroken line of adjudicated cases, both in this State and in the other States of the Union.

Where, therefore, at the time of such transaction, there is an existing debt, the true inquiry is, was such debt, by the transaction, in good faith extinguished? If it was, there can be no mortgage, for the reason that there is no debt to secure. If it was not extinguished, the transaction, no matter what its form, will resolve itself into that of a mortgage security.

In this case the transaction between the appellants and the appellee is in the form of an absolute conveyance of the land in dispute, and, unaided by evidence other than the deed, the court would be compelled to hold that the appellee was the absolute owner of the land. The transaction between the appellant Elihu Wolfe and the appellee is in the form of a

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conditional sale, and the courts, without the aid of some evidence showing the circumstances under which the note and title-bond were executed, would be compelled to construe it as such.

Taking these three papers alone, we are unable to say whether they constitute one entire transaction or whether they represent two transactions. When the fact is admitted or established that they constitute one transaction, then the rule is well settled that they must be construed together.

It is true that the fact that all these papers bear the same date is evidence that they constitute one transaction, but they do not prove it conclusively. Under our statutes the husband and wife, as to their property rights, are separate and distinct persons, and as, by the transaction now under consideration, the wife is divested of her title to the land in dispute and the husband invested with it, unaided by oral evidence there would seem to be two transactions between the parties.

It is claimed by the appellee that the land was conveyed to him by appellants in full satisfaction and payment of the amount due him on his one thousand dollar note; this claim is denied by the appellants. This raises a question of fact which can only be determined by the evidence. Our conclusion is that the deed, note and title-bond above referred to do not absolutely constitute a mortgage, and that parol evidence was properly received to show the real transaction between the parties to these instruments. *Lentz v. Martin*, 75 Ind. 228; *Hays v. Carr*, 83 Ind. 275; *Davis v. Stone-street*, 4 Ind. 101; *Heath v. Williams*, 30 Ind. 495; *Church v. Cole*, 36 Ind. 34; *Glover v. Payn*, 19 Wendell, 518; *Robinson v. Cropsey*, 2 Edw. Ch. 138; 1 Jones Mortg., section 267; *Rogers v. Beach*, 115 Ind. 413.

Indeed, the pleadings were formed and the cause was tried in the circuit court upon the theory that the deed, note and title-bond on their face constituted a conditional sale. What we have said disposes of the exception saved on the motion

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of the appellants to strike out the evidence introduced by the appellee tending to show that the transaction was intended as a sale, and not as a mortgage. In refusing to strike out such evidence the court did not err.

At the proper time the appellant Delphia A. Wolfe offered to testify in her own behalf, in substance, that she was ignorant of the law, and did not know that a mortgage executed by her on her separate property to secure the debt of her husband was not binding on her. The court sustained an objection to this offered evidence, and she excepted.

Ordinarily, the rule is, that the courts will not afford relief against a mistake or ignorance of the law.

In this case it was not proposed to prove that the appellee had made any statements to said appellant which misled her, or that he even had any knowledge that she was ignorant of her legal rights. Under these circumstances it was not error to exclude the offered testimony.

After the close of the testimony in the cause, the court instructed the jury that it was their duty to return a verdict for the appellee, and the appellants excepted.

The right of the court to direct a verdict for the defendant, in case the plaintiff's evidence, giving it the most favorable construction it will legitimately bear, fails to establish any fact which constitutes an essential element in his right of action, is clear. *Purcell v. English*, 86 Ind. 34; *Hall v. Durham*, 109 Ind. 434; *Gregory v. Cleveland, etc., R. R. Co.*, 112 Ind. 385.

The rule which governs such cases is analogous to the rule which governs on a demurrer to the evidence. If the plaintiff's evidence, with all the legitimate inferences which a jury might reasonably draw from it, is insufficient to sustain a verdict in his favor, so that if a verdict for the plaintiff, if one should be returned, would be set aside, the court may properly direct a verdict for the defendant, without submit-

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ting the evidence to the jury. *Gregory v. Cleveland, etc., R. R. Co., supra.*

In this case we think there is evidence in the record, both direct and circumstantial, from which the jury might have inferred legitimately that the deed, note and title-bond constituted only a mortgage. The jury, in our opinion, should have been permitted to pass upon that question. For the error of the court in instructing the jury to return a verdict for the appellee, this cause must be reversed.

Cause reversed, with instructions to the circuit court to grant a new trial, and for further proceedings not inconsistent with this opinion.

BERKSHIRE, J., took no part in the decision of this cause.

Filed March 9, 1889.

117	594
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No. 13,639.

VICKERY ET AL. v. MCCORMICK.

PRACTICE.—Evidence.—Objection to.—An objection to evidence, to be available, must be made when a question which seems to invite improper evidence is asked, and the particular evidence and the specific grounds of objection must be fairly pointed out and stated.

SAME.—Motion to Strike Out.—If objectionable evidence is volunteered by a witness, or given in an answer that is not responsive to the question asked, or otherwise, before objection can reasonably be made, a motion should be made to strike out the particular matter which is considered improper.

CONTRACT.—To Furnish Material.—Measure of Damages.—The measure of damages for the breach of a contract to furnish lumber of a specified kind, is the difference between the contract price and the market value at the time and place of delivery fixed by the contract; but if the kind of material specified can not be had at the place of delivery agreed upon, it may be bought in the nearest market, or where it can be procured on the most advantageous terms, and the additional cost and expense charged to the defaulting vendor.

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SAME.—*Suspension of Work.—Damages Resulting From.*—Where goods are sold for a special purpose, and the vendor has notice that a failure to furnish them according to the contract will occasion special damage, by the suspension of important work, he is liable, in case of default, for the direct loss resulting as the natural consequence of the suspension.

From the Vanderburgh Superior Court.

C. L. Wedding, H. C. Gooding, J. B. Handy, C. W. Armstrong and J. B. Cockrum, for appellants.

D. B. Kumler, G. W. Cooper and G. F. Denby, for appellee.

MITCHELL, J.—McCormick sued Vickery, Cooper & Co. to recover damages alleged to have resulted to him on account of the failure of the defendants to comply with a written contract, by the terms of which they had agreed to deliver a large quantity of lumber to the plaintiff, at Evansville, Indiana.

It appeared that the plaintiff had entered into a contract with the State of Indiana for the construction of a hospital for the insane at Evansville. His contract with the State required him to use a large quantity of white-oak lumber, of a certain grade and quality, in the construction of the building. The defendants agreed to supply about six hundred thousand feet of white-oak lumber, of specified dimensions, at a stipulated price, the lumber to be delivered within ninety days, and to be "free from wind-shakes, loose or black knots, and to be sound, sawed square, and full sizes." The ground of complaint was, that because of the defendants' failure to comply with their contract the plaintiff had been put to great expense in getting other lumber of the kind agreed to be furnished, and that he suffered great damage on account of being delayed in the prosecution and completion of his contract with the State. The plaintiff had a verdict for \$2,286, but the court, upon consideration of the motion for a new trial, suggested that so much of the verdict as exceeded the sum of \$1,270.20 was excessive. Thereupon, the

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plaintiff remitted \$1,015.80, and the motion for a new trial was overruled and judgment entered for \$1,270.20.

Such questions as there are for decision are predicated on the ruling of the court in overruling the motion for a new trial.

On appellants' behalf it is contended that the court erred in admitting certain testimony delivered by the plaintiff in his own behalf at the trial. The testimony appears in the bill of exceptions, in narrative form. An examination of the record discloses that the plaintiff testified, in substance, that he had written and spoken to several other lumber dealers, after the defendants failed to comply with their contract, with a view of procuring the lumber, so that he might proceed with the construction of the work, but that the persons communicated with had told him that they were unable, or unwilling, to furnish the lumber. After the witness had proceeded with his testimony thus far, the record shows that the "defendants' counsel object to the recital of communications between witness and saw-mill men." There is no ground of objection stated, nor does it appear that any objection was made to any question that had been asked, or that any motion was made to strike out any particular answer. Now, while we doubt whether the evidence was in and of itself objectionable, since it tended to show that the plaintiff exercised diligence in trying to procure other lumber to supply that which the defendants failed to furnish, the record presents no question for decision. In order to make an objection to evidence available, the objection must be made when a question which seems to invite objectionable evidence is asked, and the particular evidence as well as the specific grounds of objection must be fairly pointed out and stated, or if objectionable evidence is volunteered by a witness, or given in an answer that is not responsive to the question asked, or otherwise, before objection can reasonably be made, a motion should be made to strike out the particular matter which is considered objectionable. Merely to object, in a

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general way, after testimony has been delivered, because the evidence is incompetent, irrelevant and immaterial, or without fairly specifying the particular evidence objected to, or moved to be stricken out, presents no question. *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196. Elliott Advo., 260-261.

Other objections of the same general character were made, and while, as in respect to that above mentioned, we discover nothing inherently objectionable in the evidence admitted, the manner in which the objections were made presents no question.

It is contended next that there is no evidence tending to sustain the verdict except such as was in the nature of hearsay evidence. It would serve no useful purpose to recapitulate the evidence. It is sufficient to say that the judgment, as it was finally entered, seems to be abundantly supported by competent proof.

The plaintiff was permitted to show the difference in the actual cost of the lumber purchased by him to supply that which the defendants failed to furnish, including the wages and travelling expenses of an agent sent out to procure and purchase the lumber.

Having given evidence tending to show that the lumber could not be obtained in the market at Evansville, it was competent for the plaintiff to prove that it was necessary for him to obtain it as he could, and, also, to show the enhanced price it cost him above what he had contracted it for, to which he was entitled to add such other loss as resulted directly from the defendants' failure to execute their agreement.

The general rule is, that a party who fails to comply with his contract to furnish goods is liable for the value of the goods in the open market at the time of the failure. But when similar goods can not be purchased in the market, the measure of damages is the actual loss sustained by the purchaser in not receiving the goods according to the contract. *Culin v. Woodbury Glass Works*, 108 Pa. St. 220; Field Dam., section 244.

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The true measure of damages for the breach of a contract to sell and deliver material, a part of which only is delivered, is the difference between the contract price and the market value of the material at the time and place fixed by the contract. If the articles to be delivered have no market value, or can not be had in the market where, by the contract, they were to have been delivered, they may be bought in the nearest market, or where they can be procured on the most advantageous terms, and the additional cost and expense charged to the vendor who failed to comply with his contract. *Capen v. De Steiger Glass Co.*, 105 Ill. 185.

Where goods are sold for a special purpose, and the vendor has notice that the failure to furnish the goods according to contract will occasion special damage, by the suspension of an important work, the purchaser is entitled to recover any direct loss which he may sustain on account of the unreasonable failure of the vendor to perform his contract. *Louisville, etc., R. R. Co. v. Hollerbach*, 105 Ind. 137; 2 Suth. Dam. 400, 401.

This may include the enhanced cost, above the contract price, of procuring the material which the vendor failed to furnish, together with the direct loss which actually resulted as the natural consequence of the suspension of the work, if suspension was the necessary and natural consequence of the failure to furnish the material. *Pennsylvania R. R. Co. v. Titusville, etc., Co.*, 71 Pa. St. 350.

An examination of the evidence leads to the conclusion that all damages, except the amount of the actual expense of procuring the lumber above what it would have cost had the appellants complied with their contract, were remitted, and that the judgment includes nothing for the suspension of the work, loss of time, and the like. Certainly the appellants had no ground of complaint.

There was no error.

The judgment is affirmed, with costs.

Filed March 8, 1889.

Boswell, Administratrix, v. Boswell *et al.*

No. 13,765.

THE INDIANAPOLIS BOARD OF TRADE v. WALLACE,
RECEIVER.

From the Marion Superior Court.

C. Baker, O. B. Hord, A. W. Hendricks, F. Winter, A. Baker and E. Daniels, for appellant.

B. Harrison, W. H. H. Miller and J. B. Elam, for appellee.

MITCHELL, J.—Pending the adjustment of the affairs of the firm of Fletcher & Sharpe, the partnership assets being in the hands of William Wallace, Esq., a receiver appointed by the Superior Court of Marion county, the Indianapolis Board of Trade filed an intervening petition in its own behalf, alleging that Albert E. Fletcher, one of the firm of Fletcher & Sharpe, was indebted to the intervenor for moneys received by him in the capacity of treasurer of the Board of Trade, which moneys had been deposited with the firm of Fletcher & Sharpe, who were engaged in the banking business.

The intervenor sought to obtain a preference over the partnership creditors of the firm, out of certain individual property conveyed by Albert E. Fletcher to the firm of which he was a member.

All the questions made in the present case were considered and decided adversely to the intervenor in *Winslow v. Wallace*, 116 Ind. 317.

On the authority of the above mentioned decision, the judgment in this case is affirmed, with costs.

Filed Sept. 22, 1888; petition for a rehearing overruled Dec. 14, 1888.

No. 13,984.

THE NEW ALBANY AND EASTERN RAILWAY COMPANY
v. DAY.

From the Floyd Circuit Court.

A. Dowling, for appellant.

E. G. Henry, C. L. Jewett and H. E. Jewett, for appellee.

ELLIOTT, C. J.—Affirmed on the authority of *New Albany, etc., R. W. Co. v. Day*, *ante*, p. 337.

Filed Feb. 15, 1889.

No. 14,613.

BOSWELL, ADMINISTRATRIX, v. BOSWELL ET AL.

From the Benton Circuit Court.

N. W. Bliss, T. L. Merrick and H. S. Travis, for appellant.

H. W. Chase, F. S. Chase and F. W. Chase, for appellees.

ELLIOTT, C. J.—For the reason given in *Smythe v. Boswell*, *ante*, p. 365, and upon the authorities there cited, this appeal is dismissed.

Filed Feb. 19, 1889.

Johnson v. Ahrens *et al.*

No. 13,986.

THE NEW ALBANY AND EASTERN RAILWAY COMPANY
v. MEYERS ET AL.

From the Floyd Circuit Court.

A. Dowling, for appellant.

C. L. Jewett and *H. E. Jewett*, for appellees.

ELLIOTT, C. J.—Affirmed on the authority of *New Albany, etc., R. W. Co. v. Day, ante*, p. 337.

Filed Feb. 15, 1889.

No. 13,985.

THE NEW ALBANY AND EASTERN RAILWAY COMPANY
v. DAY.

From the Floyd Circuit Court.

A. Dowling, for appellant.

E. G. Henry, C. L. Jewett and *H. E. Jewett*, for appellee.

ELLIOTT, C. J.—Affirmed on the authority of *New Albany, etc., R. W. Co. v. Day, ante*, p. 337.

Filed Feb. 15, 1889.

No. 13,471.

JOHNSON v. AHRENS ET AL.

From the Warren Circuit Court.

C. V. McAdams, for appellant.

J. McCabe and *E. F. McCabe*, for appellees.

BERKSHIRE, J.—The questions which are presented by the record of this cause and the errors assigned thereon are exactly the same as in the case of *Jones v. Ahrens*, 116 Ind. 490.

For the reasons given in the decision of that cause, this case must be affirmed.

The judgment is affirmed, with costs.

Filed Jan. 10, 1889.

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BOND.

See APPEAL BOND; DECEDENTS' ESTATES, 7, 17; DRAINAGE, 3 to 6; JUSTICE OF THE PEACE; TOWNSHIP; WILL, 1.

Contractor for County Building.—Liability of Sureties.—Debts Incurred by Sub-contractor.—Sureties on a bond given under section 4246, R. S. 1881, by a contractor for the construction of a county building are not liable for debts incurred by a subcontractor.

State, ex rel., v. Hinsdale-Doyle Granite Co., 476

BURDEN OF PROOF.

See ATTORNEY AND CLIENT, 2; BENEFIT SOCIETY, 2; RAILROAD, 14.

CASE OVERRULED.

Smith v. Wiley, 21 Ind. 224, overruled. *Royce v. Turnbaugh*, 539

CHANGE OF JUDGE.

Special Judge.—Appointment.—Discretion of Court.—Under section 1770, R. S. 1881, where a change of judge has been applied for and granted, the matter as to who shall be appointed to try the case rests wholly in the discretion of the court. *Walter v. Walker*, 247

CHARGE UPON LAND.

See REAL ESTATE, 1 to 7.

CHATTEL MORTGAGE.

See FIXTURES.

CITY.

See MUNICIPAL CORPORATION.

COMMERCIAL PAPER.

See PROMISSORY NOTE.

COMMON CARRIER.

See RAILROAD.

COMPROMISE.

See CONTRACT, 1; JUSTICE OF THE PEACE.

Contract.—Nudum Pactum.—Where a compromise is agreed upon, and one party agrees to pay the other a certain sum in satisfaction of a claim which the latter is making against the former, there must be some foundation for the claim, or the agreement is a *nudum pactum*, and not enforceable. *Emery v. Royal*, 299

CONSIDERATION.

See CONTRACT; EVIDENCE, 4; FRAUDULENT CONVEYANCE, 1, 3 to 5.

CONSTITUTIONAL LAW.

See CRIMINAL LAW, 20; TAXES, 1 to 3.

1. *Notice.—Due Process of Law.—Individual Property Rights.*—A statute conferring upon a tribunal power to finally dispose of the property rights of an individual, and failing to provide for notice, denies to the citizen due process of law, and is unconstitutional. *Kuntz v. Sumption*, 1
2. *Taxation.—Board of Equalization.—Authority to Change Valuation of Individual Property.—Notice.—Statute.*—The statute of this State assuming to confer authority upon the county board of equalization to conclusively change the valuation placed upon property by an individual taxpayer and to add property to his list, does not provide for notice, and is unconstitutional. *Ib.*
3. *Criminal Prosecutions.—Penalties.*—The Constitution of this State, in speaking of criminal prosecutions, does not refer to the enforcement of statutory penalties. *Durham v. State, ex rel.*, 477

CONTEMPT.

See DEPOSITION.

CONTEST OF WILL.

See WILL, 1 to 5.

CONTRACT.

See BENEFIT SOCIETY; COMPROMISE; JUDGMENT, 8; JUSTICE OF THE PEACE; LANDLORD AND TENANT; MARRIED WOMAN, 1, 2; MORTGAGE, 3, 4; PARTNERSHIP; PROMISSORY NOTE, 7; REAL ESTATE, 9 to 12; SALE.

1. *Judgment.—Annulment.—Injunction.—Compromise.—Consideration.*—A complaint to annul a judgment and enjoin a levy thereunder, alleging that the parties to the judgment had entered into an agreement compromising the matters in difference between them and stipulating that a new trial should be granted the plaintiff and a judgment rendered in his favor, and alleging further that the plaintiff had performed the contract on his part, but not stating the contract more fully or averring a consideration, is bad. *Plunkett v. Black, 14*
2. *Same.—Breach of Contract to Release.—Damages.*—An executory contract for the release of a judgment is not effective until its conditions have been performed; but a failure of the judgment holder to comply with the contract makes him liable in damages to the judgment debtor, if the latter has performed on his part. *Ib.*
3. *Sale.—Future Delivery.—Margins.*—A contract for the sale and future delivery of a commodity which may be procured in the market at the proper time, is valid, if it is the intention of the parties, or one of them, that the commodity shall actually be procured and delivered, and this is so, although money may be deposited, as a margin, to secure performance or as indemnity against loss. *Sondheim v. Gilbert, 71*
4. *Same.—Speculative Transactions.—Void Contracts.—Public Policy.*—If no delivery is contemplated, and the intention of the parties is merely to speculate on the rise or fall of the market, and adjust the account between them by paying or receiving the difference between the contract and current price, the contract is against public policy and void. *Ib.*
5. *Admission in, as to Amount Due.—Avoidance.—Reformation.*—Where a contract contains an admission as to the amount due from the defendant to the plaintiff, it is not necessary for the former to ask a reformation thereof, but an answer alleging that the contract was drawn by the plaintiff, and that he erroneously, either purposely or inadvertently, inserted an amount greater than that due from the defendant, is sufficient to avoid the effect of the admission. *Brake v. Sparkes, 89*
6. *Judicial Sale.—Redemption.—Statute of Frauds.*—Where a creditor bids in the property of the debtor at a sale under a mortgage, and agrees that if the latter will not redeem he will take a sheriff's deed and hold the land as a security for the payment of his claim, the contract is not within the statute of frauds. *Moorman v. Wood, 144*
7. *Account Accruing Under.—Right to Sue Upon.*—A party is not bound to sue for the breach of a written contract, but he may sue upon an account accruing thereunder. *Marshall v. Levark, 377*
8. *Consideration.—Railroad.—Agreement of Third Persons to Pay Contractors.*—Where by the terms of the agreement between the contractors for the construction of a railroad and the railroad company, the former are not to proceed with the work until after the company has secured the means necessary to pay therefor, a subsequent contract of third persons, reciting the fact of a deficit in the funds of the company to a certain amount and their desire for the speedy completion of the road, and engaging to pay to the contractors the deficit, upon certain conditions, if so much remained when the work was completed, is enforceable by the contractors after the work is done and the con-

ditions performed, it being then too late to question the consideration for the agreement; besides, the consideration is sufficient.

Brownlee v. Lowe, 420

9. *Same.—Several Liability of Obligors.—Satisfaction of Debt.*—Where the deficit is twenty-five thousand dollars and the signers of the contract severally agree to pay the maximum sum of two hundred and fifty dollars, that amount may be collected from individual obligors until the whole debt is satisfied, although the proportion of the obligors as between themselves is less than the stipulated liability of each. *Ib.*
10. *Change in Work to be Performed.—Damages.*—A party to a written contract can not recover damages resulting from a change in the work to be performed by him under such contract, when the change is made at his request and for his benefit. *Spence v. Board, etc., 573*
11. *Same.—Extra Work.—Fault of Contractor.*—A party who has contracted to construct abutments and piers for a bridge can not recover for extra work caused by defective coffer-dams unskillfully constructed by him. *Ib.*
12. *Same.—Construction of Written Contract.—Instruction to Jury.*—An instruction imposing upon the jury the duty of construing a written contract, or giving them authority to do so, is erroneous. *Ib.*
13. *To Furnish Material.—Measure of Damages.*—The measure of damages for the breach of a contract to furnish lumber of a specified kind, is the difference between the contract price and the market value at the time and place of delivery fixed by the contract; but if the kind of material specified can not be had at the place of delivery agreed upon, it may be bought in the nearest market, or where it can be procured on the most advantageous terms, and the additional cost and expense charged to the defaulting vendor. *Vickery v. McCormick, 594*
14. *Same.—Suspension of Work.—Damages Resulting From.*—Where goods are sold for a special purpose, and the vendor has notice that a failure to furnish them according to the contract will occasion special damage, by the suspension of important work, he is liable, in case of default, for the direct loss resulting as the natural consequence of the suspension. *Ib.*

CONTRACTOR'S BOND.

See BOND.

CONTRACTOR'S LIEN.

See CORPORATION, 2; RAILROAD, 28.

CONTRIBUTORY NEGLIGENCE.

See MASTER AND SERVANT; MUNICIPAL CORPORATION, 6; NEGLIGENCE; RAILROAD, 1.

CONVERSION.

See DRAINAGE, 3; RECEIVER; TRUST AND TRUSTEE, 1.

CONVEYANCE.

See DEED; FRAUDULENT CONVEYANCE; JUDGMENT, 1, 2; REAL ESTATE; VENDOR AND PURCHASER.

CORPORATION.

See BENEFIT SOCIETY; MUNICIPAL CORPORATION; RAILROAD, 26 to 28.

1. *Railroad.—Execution.—What May Not be Sold.*—Neither the franchise and privileges of a railroad company, nor any lands, easements, or things essential to the existence of the corporation, or necessary to the enjoyment of its franchise, can be sold on execution or order of

court to satisfy a judgment at law against it. *Aliter*, as to locomotives, cars and other personal property.

Louisville, etc, R. W. Co. v. Boney, 501

2. *Same.—Contractor.—Lien.—Enforcement.*—A contractor for the construction of a road-bed for a railroad company acquires, under the statute, a lien upon so much of the road-bed as is constructed by him, which may be foreclosed; but there is no statutory provision for the sale of the road as an entirety, or the franchise, or anything that would destroy or impair the use of the franchise, and while the corporation remains solvent payment must be enforced out of other property or funds in such appropriate manner as a court of equity may determine. *Ib.*

COSTS.

See CRIMINAL LAW, 13; DECEDENTS' ESTATES, 14.

1. *Appeal from Justice of the Peace.—Reduction of Judgment.*—Where judgment is rendered for seventy dollars before a justice of the peace, and on appeal the circuit court adjudges that the plaintiff is entitled to recover fifty dollars tendered by the defendant, "and the sum of twenty-two dollars," there is no reduction of the judgment of the justice and the defendant is not entitled to costs. *Taggart v. Ratta, 138*
2. *County Commissioners.—Appeal from Allowance by.—Repeal of Statute.*—The provision of section 5771, R. S. 1881, that if a party appealing from an allowance by the board of county commissioners fails to recover more on the appeal than is allowed by the board, he shall pay the costs of the appeal, was not repealed by the act of 1879 (Acts of 1879, p. 106). *Spence v. Board, etc., 573*
3. *Same.—Immaterial Error.*—Where the circuit court adjudges the costs as contemplated by the statute, the method by which it reaches that conclusion, whether by considering evidence of a tender or otherwise, is immaterial. *Ib.*

COUNTY COMMISSIONERS.

See COSTS, 2; TOWNSHIP.

Term of Office.—Act of 1885.—C. was elected county commissioner in 1884. The regular term in the district for which he was elected expired in December of that year, but by reason of confusion which had resulted from the resignation of a prior commissioner, C.'s predecessor held until December, 1885, when C. entered upon his official duties. H. was elected to the same office in 1886, and claims that he was entitled to possession in December, 1887.

Held, that C.'s right to hold did not terminate in December, 1887, but that, under the act of March 7th, 1885 (Acts of 1885, p. 69), he is entitled to hold until December, 1890, the end of the current term.

State, ex rel., v. Clendenning, 111

COUNTY RECORDER.

1. *Negligence.—Nominal Damages.*—A recorder of deeds who is guilty of a breach of duty is liable only for nominal damages, unless the plaintiff proves an actual loss. *State, ex rel., v. Davis, 307*
2. *Same.—Liability to Lien-Holder.*—Where a recorder negligently so records a deed, reserving a lien, as to make the amount of the lien two hundred dollars when it should be five hundred, he is not liable beyond nominal damages, unless the plaintiff proves that he can not collect the full amount of the lien from the person who assumed its payment. *Ib.*

COVERTURE.

See MARRIED WOMAN; STATUTE OF LIMITATIONS, 2.

CRIMINAL LAW.

See CONSTITUTIONAL LAW, 3; TAXES, 7, 8.

1. *Keeping Disorderly Liquor Shop.—Statute Construed.*—Under section 2097, R. S. 1881, which provides that "Whoever keeps a place where intoxicating liquors are sold, bartered, given away, or suffered to be drunk in a disorderly manner," etc., shall be guilty of a misdemeanor, the offence consists in keeping the place in a disorderly manner.
Nace v. State, 114
2. *Same.—Continuous Offence.*—The provision of such section that whoever keeps a place where intoxicating liquors are sold, in a disorderly manner, "shall be fined, for every day the same is so kept, not more than one hundred dollars nor less than ten dollars," creates one continuous offence, the length of time the place is kept, prior to the prosecution, in the manner prohibited, being important only in measuring the punishment.
Ib.
3. *Same.—Justice of Peace.—Jurisdiction.*—Where an affidavit based on such section is filed before a justice of the peace, charging that the defendant has kept a disorderly place for one year, the minimum punishment for the offence charged, being ten dollars for each day, exceeds the justice's jurisdiction, and a judgment of conviction rendered by him is void. The justice having no jurisdiction, the circuit court could acquire none by appeal, and should have discharged the defendant.
Ib.
4. *Failure of Defendant to Testify.—Instruction.—Practice.*—The trial court is not required to instruct the jury, as provided in section 1798, R. S. 1881, that the failure of the defendant to testify in his own behalf shall not be considered by them, unless it is asked to do so as provided in section 1823, and it is too late to make such request after the argument is closed and the jury instructed.
Grubb v. State, 277
5. *Evidence.—Letter.—Authorship.*—In determining the authorship of a letter offered in evidence, and attributed to the defendant, the court has the right to consider anything appearing on its face, in connection with the other evidence bearing on the question, and it is not required to instruct the jury not to consider remarks made by the court in their presence and constituting the reasons for its decision.
Ib.
6. *Misconduct in Argument.*—Where counsel for the State is guilty of misconduct in argument, and the trial court does all it can and all that it is asked to do to remedy the injury that may be done to the defendant thereby, the matter will not be reviewed in the Supreme Court. If the defendant thinks the injury is of such a character as not to be remediable by any action of the court, he should move to set aside the jury, or take such other steps as he may think necessary to secure him an impartial trial.
Ib.
7. *Expert Witness.—Cross-Examination.—Waiver of Error.*—Where a witness, examined as an expert, expresses an opinion based upon facts assumed by the party introducing him to have been proved, or upon a hypothetical case put by such party, the other party may cross-examine the witness by taking his opinion upon any other set of facts assumed by him to have been proved, or upon a hypothetical case. If the right to so cross-examine is denied, the error will be cured if the party calls the witness in his own behalf and proves the matters he attempted to elicit by cross-examination.
Ib.
8. *Insanity.—Non-Expert Witness.—Opinion.*—Where the soundness of the defendant's mind is in question, a witness who talked with him on the day on which he says he was sane, and a witness who has known him

- intimately for several years, may, upon stating the facts, give opinions as to the condition of his mind. *Ib.*
9. *Same.—Opinion Must be Based on Facts Stated.*—Insanity is a fact that can not be proved by reputation; nor by a witness who is not an expert, unless the witness first gives the facts upon which his opinion is based. *Ib.*
 10. *Same.—Irresistible Desire to Take Life.*—It is proper to refuse to instruct the jury as matter of law that insanity "sometimes takes the form of an irresistible desire to take human life." *Ib.*
 11. *Refusal to Give Instructions.—Reversal of Judgment.*—A case will not be reversed on account of the refusal of the court to give an instruction, if the instructions given cover the essential elements of the law contained in the instruction refused. *Ib.*
 12. *Same.—Insanity.—Instructions Upon.*—For a consideration of instructions, given and refused by the trial court, upon the subject of insanity as a defence in a prosecution for homicide, see opinion. *Ib.*
 13. *Exemption of Defendant from Costs.*—Under section 1838, R. S. 1881, the jury may be instructed that if they find the defendant guilty, they may, in their discretion, exempt him from all costs. *State v. Sevier, 338*
 14. *Same.—Intoxication in Public Place.—Unintentional Intoxication.*—Under section 2091, R. S. 1881, one who is found in any public place in a state of intoxication is guilty of a misdemeanor, without regard to whether the condition of intoxication be produced by appetite or mistake, or result from too closely following the prescription of a physician preparatory to having teeth extracted. *Ib.*
 15. *Assault and Battery.—House of Public Entertainment.—Liquor Shop.*—A shop for the sale of intoxicating liquors is, in a sense, a house of public entertainment, and if the proprietor strikes one whom he has ordered from his premises, and who is guilty of no misconduct justifying his forcible expulsion, he is guilty of assault and battery. *Connor v. State, 347*
 16. *False Representations.—Larceny.*—Where one bargains for goods under an assumed name, paying only a part of the agreed price for the same—the contract providing that the title to the goods shall remain in the sellers until full payment is made—and immediately upon receipt of the goods ships them to a distant State and follows them there, these facts show a preconceived scheme to obtain possession of the goods, and feloniously appropriate them, and constitute a larceny. *March v. State, 547*
 17. *Same.—Larceny.—Trespass not Necessary to Constitute.*—It is not necessary that there should be a trespass in order to constitute a larceny. Where a fraudulent device or scheme is resorted to for the purpose of divesting the owner of title and possession, the offence is larceny. *Ib.*
 18. *Same.—Newly Discovered Evidence.—New Trial.*—A defendant in a criminal case can not obtain a new trial, on the ground of newly discovered evidence, by producing a letter exculpating him from the charge, and swearing that it was written by a person by whom it purports to be signed. *Ib.*
 19. *Renting Rooms for Gaming Purposes.—Evidence.*—For evidence considered and held sufficient to sustain a conviction for renting a room to be used for gaming purposes, see opinion. *Morgan v. State, 569*
 20. *Same.—Statutory Sufficiency of Evidence of Offence.—Province of Jury.—Constitutional Law.*—Section 1815, R. S. 1881, prescribing what shall be sufficient evidence that a place was rented for the purpose of gaming, is not unconstitutional as being in derogation of the right of the jury to determine both the law and the facts in a criminal cause, and it is,

therefore, proper to instruct the jury in accordance with the terms of that statute. *Ib.*

21. *Instruction to Jury.—Omissions.*—Where an instruction is correct as far as it purports to go, it can not be treated as erroneous because it does not go further and include some other proposition. It is only by asking a special instruction covering the omitted matter that a question can be reserved upon a failure of the court to instruct the jury upon it. *Ib.*
22. *Disagreement of Jury.—Instruction as to.*—It is not error for the court to fail to instruct the jury, on its own motion, upon a contingency so remote as that involving their right to find one defendant guilty and disagree as to another. *Ib.*

DAMAGES.

See ASSAULT AND BATTERY; ATTORNEY AND CLIENT; BASTARDY; BENEFIT SOCIETY, 8; BICYCLE; CONTRACT, 2, 10, 11, 13, 14; COUNTY RECORDER; DRAINAGE, 5; JURISDICTION, 3, 4; LANDLORD AND TENANT; MASTER AND SERVANT; MUNICIPAL CORPORATION, 1, 2, 6; NEGLIGENCE; PLEADING, 7, 10; PRACTICE, 1, 2, 10; QUIETING TITLE, 2; RAILROAD; VENDOR AND PURCHASER.

Bicycle a "Vehicle."—*Use Upon Sidewalk Unlawful.*—*Personal Injuries.*—*Damages.*—A bicycle is a vehicle within the meaning of the law, and, therefore, under section 3361, R. S. 1881, its use upon a public sidewalk is unlawful, and its rider liable for an injury inflicted upon a footman, although the act be unintentional. *Mercer v. Corbin, 460*

DEBTOR AND CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; CONTRACT, 6; FRAUDULENT CONVEYANCE; PROMISSORY NOTE, 7.

DECEDENTS' ESTATES.

See REAL ESTATE, 1 to 7; WILL.

1. *Final Settlement.—Jurisdiction to Set Aside.*—The circuit courts have jurisdiction to set aside final settlements of administrators for fraud, mistake or illegality. *Pollard v. Barkley, 40*
2. *Same.—Proceeding to Set Aside.—Remedial Statute.*—Statutes providing for the setting aside of such settlements are remedial, and proceedings for that purpose must be prosecuted under the statute in force at the time they are commenced. *Ib.*
3. *Same.—Attorney Fees.—Administrator not Entitled to.*—An allowance of attorney fees to an administrator for his personal services as an attorney in the settlement of an estate, is prohibited by sections 2396 and 2398, R. S. 1881, and, if made, constitutes an "illegality" for which the settlement may be set aside, within the meaning of section 2403. *Ib.*
4. *Same.—Evidence.*—Where a sum has been allowed to an administrator for his services as such and as an attorney, it is proper, in a proceeding to set the settlement aside, for the court to hear evidence as to the value of the services rendered as administrator, in order to ascertain the amount allowed as attorney fees. *Ib.*
5. *Same.—Administrator's Allowance.*—In making an allowance to an administrator for his services, the nature of the estate, the difficulties attending the recovery of the assets, the peculiar qualifications of the administrator, the advantage to the estate from such qualifications, and all other facts and circumstances which will enable the court to come to a proper conclusion, should be considered. *Ib.*
6. *Estate of a Deceased Administrator.—Causes for which Suit against Can be Maintained.*—The estate of a deceased administrator can not be sub-

jected to the costs of a suit, unless the administrator had neglected some duty, or unless he had been guilty of some default, for which a suit might have been maintained against him had he lived.

Lucas v. Donaldson, 159

7. *Same.—Bond of Deceased Administrator.—Suit Upon.*—Suit can be maintained on the bond of a deceased administrator for the violation of any of the duties of his trust. Section 2458, R. S. 1881. *Ib.*
8. *Same.—Settlement of Trust by Administrator.*—It is the duty of the executor or administrator to take possession of trust funds which remain in the hands of the decedent at the date of his death, and to settle his accounts in relation to the trust. The administrator or executor is not bound to proceed to the execution of the trust, but must preserve the fund for those entitled, and must pay it over to them, or to some one duly authorized to receive it, under the order of the proper court. *Ib.*
9. *Same.—Pleading.—Complaint against an Estate.—What it Must Contain.*—A complaint against an estate need not be technically formal, but it must state the facts essential to show that the estate is liable under the statute. *Ib.*
10. *Sale of Real Estate.—Insane Widow.—Guardianship.*—The guardian of a decedent's insane widow had the right to file a written assent for his ward to the petition of the executor in a proceeding instituted in the common pleas court to sell real estate for the payment of the decedent's debts. *Smock v. Reichwine, 194*
11. *Same.—Partition Proceeding.—Adjudication of Widow's Title.*—Where, after such sale, the guardian brought suit for the partition of the remaining real estate, the common pleas court had jurisdiction in the partition case to adjudicate upon and divest the title of the widow to the real estate sold by the executor to pay the decedent's debts. *Ib.*
12. *Same.—Widow Takes as Heir.—Parties.*—The widow takes the interest that the law gives her in the real estate of which her husband dies seized, as heir, and not by virtue of her marital rights. She is a proper party to a petition to sell real estate for the payment of the decedent's debts. *Ib.*
13. *Sale of Real Estate.—Mortgage Lien.—Priorities.—Adjudication.*—Where, in a proceeding by an administrator to sell real estate to pay debts, which are not shown to be senior claims, a mortgagee, by cross-complaint, asks the foreclosure of his mortgage, and it is ordered that the mortgage be foreclosed as to part of the real estate embraced therein, and that the remainder be sold by the administrator discharged of liens, any deficiency in favor of the mortgagee to be paid by such administrator, in its order of priority, upon the further order of the court, no question of priority as between the mortgage and the debts for the payment of which the land is asked to be sold is adjudicated. *Ryker v. Vawter, 425*
14. *Same.—Sale of Land Discharged of Liens.—Application of Proceeds.—Mortgage.—Costs, Funeral Expenses, etc.*—One holding a mortgage executed by a decedent upon real estate which an administrator is ordered to sell discharged of liens, is entitled, under section 2435, R. S. 1881, to have the entire proceeds of the sale applied to the payment of his mortgage debt, if so much is necessary, to the exclusion of claims for costs of administration, funeral expenses and expenses of last sickness. *Ib.*
15. *Partial Distribution.—Petition for.—Jurisdictional Facts.*—A petition in the circuit court, by an administrator and heirs, asking the ascertainment of advancements and an order for partial distribution of funds in his hands, is not bad because it is silent upon the subject of the

decendent's domicile, the issuing of letters of administration, the location of property, or other jurisdictional facts; but the facts showing want of jurisdiction in the court to act upon the petition must be brought forward by answer. *Chapell v. Shuee, 481*

16. *Same.—Ascertainment of Advancements.*—Under the provisions of the statute (Acts of 1883, p. 158, section 18, and section 2380, R. S. 1881) the circuit court may, in its discretion, upon a proper petition, at any time previous to the settlement of an estate, allow a partial distribution to heirs of moneys in the hands of the executor or administrator; and in such proceeding it has jurisdiction to ascertain the amount of advancements made by the decedent. *Ib.*
17. *Same.—Bond.—Failure of Court to Require.*—The failure of the court to require the heirs to give bond, as required by section 2380, R. S. 1881, for the return of the money distributed, in case it is needed to pay debts, is an informality which will not, in the absence of any seasonable objection, invalidate the judgment as to the parties in court. *Ib.*

DEED.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; COUNTY RECORDER; EVIDENCE, 3, 6; MORTGAGE, 7; VENDOR AND PURCHASER.

1. *Construction of.—Vesting of Remainder.*—Where a deed conveys land to A. for life, "and at his death to his children begotten by him in wedlock the fee simple," and, in the event of the said A. dying without children begotten in wedlock, then the fee simple to others, the birth of a child to A. in wedlock, and not its survival of the father, is the contingency upon which the remainder vests; otherwise the limitation would be void under sections 2962 and 2963, R. S. 1881. *Amos v. Amos, 19*
2. *Same.—Reference to Contemporaneous Will.—Instruments Construed Together.*—Where a deed refers to an instrument in the form of a will, executed by the grantor contemporaneously with the deed and as a part of the same transaction, and directs that it shall be construed in the light of the provisions of the will, the latter instrument, although the testator is alive and the instrument is not effective as a will, must be considered in construing the deed, and the grantee and all claiming through him are chargeable with knowledge of the provisions of the deed and will. *Ib.*
3. *Remainder.—Vesting.—Presumption.*—The law not only favors the vesting of remainders, but it also presumes that words postponing the estate relate to the beginning of the enjoyment of the remainder and not to the vesting of the estate. *Amos v. Amos, 37*
4. *Same.—Descent.—Estate Taken by Intestate in Consideration of Love and Affection.—Rights of Widow.*—Under section 2473, R. S. 1881, relating to an estate coming to an intestate in consideration of love and affection, the widow takes only by virtue of her marital rights, and not as an heir or descendant. *Ib.*
5. *Same.—Reversion to Donor.—When Widow has no Interest.*—Where, in consideration of love and affection, land is conveyed to A. for life, with the fee to his children begotten in wedlock, and, failing children, to other persons, the remainder vests immediately upon the birth of a child, and upon the death of both A. and the child without children, the land reverts to the donor under the statute, the limitation to others not being effectual; but whether the limitation over be considered as effectual or void, the widow of A. has no interest in the land. *Ib.*

DELIVERY.

See SALE, 3 to 6.

DEMAND.

See EMBLEMENTS; REAL ESTATE, 9, 10; REPLEVIN, 4.

DEPOSITION.

1. *Contumacious Witness.—Coercion and Punishment.*—Where a witness, under examination before an officer not having power to punish for contempt, refuses to answer a proper question, the officer should report to a court having jurisdiction, and ask it to compel an answer or punish the contumacious witness. The deposition can not be suppressed on that account. *Keller v. B. F. Goodrich Co.*, 556
2. *Same.—For Use in Other State.—Assistance of Courts.*—The courts of the State where a deposition is taken, to be used in another State, will exercise their authority, when appropriately invoked, to secure competent testimony, and will assist an officer within their jurisdiction, when assistance is properly asked, to secure answers to competent questions. *Ib.*

DESCENT.

See DEED, 4, 5; WILL, 7.

Husband and Wife.—Adulterous Husband.—Judicial Sale of Husband's Land.—Estate Acquired by Wife Thereunder.—Under section 2497, R. S. 1881, a husband who is living in adultery at the time of his wife's death can take no part of her estate, and so, where she dies seized of land acquired by force of the act of 1875, relating to judicial sales of the husband's property, he is entitled to no interest therein, notwithstanding the provision in said act that land so acquired by a wife shall descend to the husband, as that provision must be construed to mean that he may take when capable of taking. *Bradley v. Thixton*, 255

DESCRIPTION.

See DRAINAGE, 10; MISTAKE; QUIETING TITLE, 3; REPLEVIN, 2.

DILIGENCE.

See ATTORNEY AND CLIENT, 3; JUDGMENT, 5, 6; NEW TRIAL, 2, 3.

DISCRETIONARY POWER.

See CHANGE OF JUDGE; DECEDENTS' ESTATES, 16; PLEADING, 4; WITNESS.

DISORDERLY HOUSE.

See CRIMINAL LAW, 1 to 3.

DOMESTIC RELATIONS.

See GUARDIAN AND WARD; HUSBAND AND WIFE; MARRIED WOMAN; MASTER AND SERVANT.

DRAINAGE.

1. *Statute.—Repealing Section of Act of April 6th, 1885.—Saving Clause.*—Under the repealing section of the drainage act of April 6th, 1885, which repealed the act of March 8th, 1883, all assessments for work done under the latter act were unaffected by the repeal, and were enforceable according to the provisions of the law under which they were made. *Geiger v. Bradley*, 129
2. *Same.—Repairs.—Assessments.—Delay in Making.—Effect of.*—Where eighteen months had elapsed from the completion of the repairs till the assessment was made, and it not appearing that the work was not necessary, or that the trustee had acted in bad faith, the assessment was not thereby invalidated, the rights of none of the parties having been changed, and the rights of innocent parties not having been affected by the delay. *Ib.*
3. *Action on Commissioner's Bond.—Repeal of Statute.—Saving Clause.*—

The saving clause in the repealing act of 1885 applies to an action on the bond of a drainage commissioner appointed under the act of 1881, for a breach of duty in the construction of a drain under the latter act, where it does not appear that prior to the commencement of the action the proceedings for the establishment of the drain had terminated. But without the saving clause, an action would lie for waste or conversion of the funds by the commissioner.

Smith v. State, ex rel., 167

4. *Same.—Deviation from Survey and Specifications.—Liability.*—A drainage commissioner has no right, of his own motion, to deviate from the plans and specifications according to which the work is ordered by the court to be constructed, and if he does so, he is liable on his bond for any damages that may result. *Ib.*
5. *Same.—Measure of Damages.*—In an action brought on the bond of a commissioner for a failure on his part to construct a drain as ordered by the court, the measure of damages is the amount necessary to complete the work in the manner ordered. *Ib.*
6. *Same.—Paying for Defective Work.—Negligence.*—If a drainage commissioner negligently pays out the money in his hands to insolvent contractors for defective work, without first requiring them to remedy the defects and construct the drain as ordered by the court, he is liable. *Ib.*
7. *Same.—Ditchers.—General Reputation for Skill.—Evidence.*—In such case, evidence of the general reputation of the persons employed to dig the drain in controversy, for skill and diligence in the business of constructing drains, would not tend to prove that the particular drain was properly constructed, or any other material fact, and its exclusion is not error. *Ib.*
8. *Act of 1883.—Lien of Assessment.—Prior Mortgage.*—The lien of a drainage assessment levied under the act of 1883 (Acts of 1883, p. 173) is junior to the lien of a pre-existing mortgage.
State, ex rel., v. Aetna Life Ins. Co., 251
9. *Same.—Personal Liability of Land-Owner.*—The drainage act of 1883 does not create a personal liability against the land-owner, but the enforcement of the assessment is confined to the land. *Ib.*
10. *Mistake in Description.—Correction while Proceedings are in Fieri.*—Where, in drainage proceedings, a clerical mistake occurs in the report of the commissioners in the description of lands affected, which is carried into subsequent interlocutory entries, such mistake may, at any time before the work is completed and the final report of the commissioner in charge is approved, be corrected by the court on petition or motion of the parties, or on its own motion. *Steele v. Hanna, 333*

DUE PROCESS OF LAW.

See CONSTITUTIONAL LAW, 1, 2.

EJECTMENT.

See APPEAL BOND.

EMBLEMENTS.

Mortgage.—Foreclosure.—Purchaser at Sheriff's Sale.—Replevin.—Demand.—A purchaser of land at sheriff's sale, under a decree of foreclosure, upon receiving a deed becomes entitled to the immediate possession of the premises, and crops thereafter sown and harvested by the mortgagor or his lessee, without the purchaser's consent, belong to the latter, and he may maintain replevin therefor without first making a demand.

Hall v. Durham, 429

EMPLOYER AND EMPLOYEE.

See ATTACHMENT AND GARNISHMENT; MASTER AND SERVANT; RAILROAD, 2, 10, 11, 16 to 22.

ESTOPPEL.

See EVIDENCE, 2; LIFE INSURANCE; MARRIED WOMAN; RAILROAD, 24, 25; REAL ESTATE, 12; WILL, 2.

EVIDENCE.

See CRIMINAL LAW, 5, 7 to 9, 18 to 20; DECEDENTS' ESTATES, 4; DEPOSITION; DRAINAGE, 7; FRAUDULENT CONVEYANCE, 2; HUSBAND AND WIFE, 3; JUDICIAL NOTICE; LANDLORD AND TENANT; LIBEL, 2; NEW TRIAL, 2 to 4; PRACTICE, 6 to 9, 12, 13, 15, 16; RAILROAD, 6, 8, 19, 20, 22; SUPREME COURT, 1, 2, 5, 12 to 16; SWAMP LAND; TRADE-MARK, 4; VENDOR AND PURCHASER; WITNESS.

1. *Real Estate.—Value.*—One who has examined property and inquired of qualified persons as to its value, may testify as to its value, although not a resident of the city where it is situate. *Jones v. Snyder*, 229
2. *Estoppel.—Practice.*—A party who secures a ruling excluding evidence offered by his adversary on a particular subject can not complain of the exclusion of evidence offered by himself to establish the opposite of what the other party had attempted to prove. *Nitche v. Earle*, 270
3. *Deed.—Secondary Evidence of Contents.*—A proper foundation must be laid before secondary evidence of the contents of a deed is admissible. *State, ex rel., v. Davis*, 307
4. *Contradiction of Witness.—Promissory Note.—Consideration.—Payment.—Replevin.*—In an action of replevin against the maker for the possession of a promissory note which the defendant claims to have been given for too large a sum, in settlement of an account which was erroneously computed, and that he has paid in full the amount actually due, he has the right, after the plaintiff has testified that he has all the time claimed the face of the note and interest, to have the latter answer as to whether or not he did not, at the time the note was delivered to the defendant, make a computation, which is exhibited and offered in evidence, showing a less amount due than that stated in the note. *Low v. Freeman*, 341
5. *Physician.—Expert.—Personal Injury.—Opinion.*—A physician, testifying as an expert, may give an opinion as to the nature and extent of an injury to the person, which is based in part on statements made to him by the injured party. *Louisville, etc., R. W. Co. v. Snyder*, 435
6. *Contemporaneous Written Instruments.—Parol Evidence.—Admissibility of to Explain.*—When property is conveyed by husband and wife by warranty deed—there having been previous money transactions between the parties to the deed—and on the same day the grantee takes the promissory note of the husband, and executes to him a title-bond, agreeing to convey to him said land upon the prompt payment of said note, the deed, note, and title-bond do not absolutely constitute a mortgage, and parol evidence is admissible to show the real transaction between the parties to said instruments. *Wolfe v. McMillan*, 587
7. *Ignorance of the Law.—Proof of, When Not Admissible.*—Evidence is inadmissible to show that one was ignorant of the law in a certain matter, when it is not proposed to prove that the other party to the transaction made any misleading statements, or that he even had any knowledge of such ignorance. *Id.*

EXECUTION.

See CORPORATION; EXEMPTION FROM EXECUTION; JURISDICTION, 1;
SALE, 3.

Corporation.—Railroad.—What May Not be Sold.—Neither the franchise and privileges of a railroad company, nor any lands, easements, or things essential to the existence of the corporation, or necessary to the enjoyment of its franchise, can be sold on execution or order of court to satisfy a judgment at law against it. *Aliter*, as to locomotives, cars and other personal property. *Louisville, etc., R. W. Co. v. Boney*, 501

EXECUTORS AND ADMINISTRATORS.

See DECEDENTS' ESTATES; REAL ESTATE, 2, 3, 5.

EXEMPTION FROM EXECUTION.

1. *Partnership Property.—Severance of Interest.*—A partner is not entitled to claim firm property as exempt from execution, but if a severance takes place, or if one partner becomes the owner of the whole of the partnership property by purchase from his co-partner, then an exemption may be claimed. *Goudy v. Werbe*, 154
2. *Same.—When Severance May Take Place.*—Partners acting in good faith have a right to sever their joint interest in the firm property by contract of sale from one partner to another, or by a division of the property between them, at any time before the firm creditors obtain a lien thereon, and thereafter claim an exemption from execution, although at the time of the severance the firm be insolvent. *Ib.*
3. *Becoming a Householder After Levy.—Right to Claim Exemption.*—A judgment was obtained against an unmarried man, who was not a householder. His property was levied upon under an execution issued on the judgment, and advertised for sale. Between the date of the levy and the date fixed for the sale, the debtor married and became a *bona fide* householder, and claimed the property, which was of less value than six hundred dollars, as exempt.
Held, that the exemption should have been allowed, and its denial entitled the debtor to enjoin the sale. *Robinson v. Hughes*, 293

EXPERT AND OPINION EVIDENCE.

See CRIMINAL LAW, 7 to 9; EVIDENCE, 5; RAILROAD, 6.

FIXTURES.

1. *Nature of Articles.—Manner of Annexation.—Intention of Party Making the Annexation.—Policy of the Law.*—The nature of the articles, and the manner in which they are affixed, and the intention of the party making the annexation, together with the policy of the law, are controlling factors in determining whether an article, which may or may not be a fixture, becomes part of the realty by being annexed to the freehold. *Binkley v. Forkner*, 176
2. *Same.—Machinery.—Intention of Purchaser.—Chattel Mortgage.—Rights of Innocent Purchasers.*—When a person purchases machinery with a view that it shall be annexed to or placed in a building of which he is the owner, and executes a chattel mortgage on the property so purchased, he thereby evinces his intention that the property shall retain its character as personalty, regardless of the manner in which it may be annexed to the freehold, and it will be so regarded where the rights of innocent purchasers are not involved. *Ib.*
3. *Same.—Chattel Mortgage.—Provision Upon Default of Payment.—Effect of.*—A provision in a chattel mortgage, that, upon default of payment of the mortgage debt, the mortgagee may take possession of the mortgaged chattels and sell the same, is, if anything beyond the mortgage

itself was needed, equivalent to an express agreement that the property shall continue to be regarded as personalty. *Ib.*

4. *Same.—Prior Real Estate Mortgage.—Right of Removal as Against.*—A chattel mortgage is effectual to preserve the character of the mortgaged chattels as against a mortgage on the realty executed prior thereto, if the chattels can be removed without injuring or impairing the value of the real estate or the buildings thereon. If the detachment would occasion some diminution in the value of the realty, as it would have stood had the attachment not been made, then the depreciation must be made whole, and the rights of the parties adjusted according to the equity of the case. *Ib.*
5. *Same.—Subsequent Real Estate Mortgage.—When Subject to Prior Chattel Mortgage.*—Where, by the language of a subsequent mortgage on real estate, chattels theretofore affixed to the realty are recognized and treated as personal property, such mortgage will be subject to a prior chattel mortgage on the same. *Ib.*

FORFEITURE.

See LIFE INSURANCE; MORTGAGE, 5; REAL ESTATE, 6, 7.

FORMER ADJUDICATION.

See JUDGMENT, 7 to 12.

FRAUD.

See APPEAL, 6; FRAUDULENT CONVEYANCE; GUARDIAN AND WARD, 1; JUSTICE OF THE PEACE; MANDAMUS, 2; PLEADING, 10; QUIETING TITLE, 2.

FRAUDULENT CONVEYANCE.

1. *Husband and Wife.—Implied Trust.—Consideration.*—Where the consideration for property which a debtor causes to be conveyed to his wife is paid by the wife, or with money which her husband owes her, no trust is implied in favor of the husband's creditors, under section 2975, R. S. 1881. *Jones v. Snyder, 229*
2. *Same.—Evidence.—Letter.—Quieting Title.*—A letter written by the husband three years after the conveyance to the wife, enumerating certain debts, the date of which is not given, and proposing to mortgage property standing in the wife's name, is not competent evidence against the wife in an action by her against the husband's creditors to quiet title. *Ib.*
3. *When Grantee Will Hold.*—A purchaser of land who pays a consideration for it will hold it as against the grantor's creditors, unless it is affirmatively shown that he participated in the grantor's fraud or had knowledge of his fraudulent intention. *Scott v. Davis, 232*
4. *Same.—Consideration.—Agreement to Support Parents.*—A conveyance is not fraudulent because the purchaser, in addition to the consideration paid in money and notes to a third person, agrees to support his father and mother during their lifetime. *Ib.*
5. *Same.—Secret Trust.*—Such an agreement by the grantee does not constitute a secret trust invalidating the conveyance, if it is otherwise supported by an adequate consideration, and the grantee is not guilty of fraud. *Ib.*

GAMING HOUSE.

See CRIMINAL LAW, 19, 20.

GARNISHMENT.

See ATTACHMENT AND GARNISHMENT; JUDGMENT, 3 to 6; JUSTICE OF THE PEACE.

GUARDIAN AND WARD.

See DECEDENTS' ESTATES, 10 to 12; TRUST AND TRUSTEE, 2.

1. *Final Settlement.—Setting Aside.—Fraud.*—Where a guardian, confederating with another, presents to the court a false statement and obtains an order for the payment to the confederate of a claim not properly chargeable against the estate of his ward, there is such fraud as authorizes the setting aside of his final settlement.

Wainwright v. Smith, 414

2. *Trust.—Real Estate.*—Where a person purchases real estate, pays one-third of the purchase-money out of funds in his hands as guardian, gives his individual notes secured by mortgage for the balance, and takes the title in his own name, a trust results in favor of the purchaser's wards as to one-third of the real estate, and no more.

Hughes v. White, 470

HARMLESS ERROR.

See PLEADING, 11, 15; PRACTICE, 11, 13; QUIETING TITLE, 1, 4.

HIGHWAY.

See TOWNSHIP.

HUSBAND AND WIFE.

See DESCENT; FRAUDULENT CONVEYANCE, 1, 2; MARRIED WOMAN; SHERIFF'S SALE, 1; SUBROGATION.

1. *Liability of Wife to Husband for Borrowed Money.*—Where a wife, possessing a large estate of her own, obtains money from her husband to be used in and for the benefit of her separate business, and expressly promises to repay it, the husband has an equitable claim for repayment which he may enforce by suit.
2. *Desertion.—Complaint for Support.*—For a complaint by a wife against her deserting husband for support, under sections 5132 and 5133, R. S. 1881, which is held sufficient, when questioned for the first time after trial and finding, see opinion.
3. *Same.—Evidence.—Conduct of Husband Prior to Separation.*—The conduct of the husband toward the wife, previous to their separation, may be proved in order that the court may determine whether it was such as to constitute a desertion.

Harrell v. Harrell, 94

Waller v. Waller, 247

Ib.

INFANT.

See GUARDIAN AND WARD; MASTER AND SERVANT, 3; STATUTE OF LIMITATIONS, 2, 3.

INJUNCTION.

See CONTRACT, 1; EXEMPTION FROM EXECUTION, 3; JURISDICTION, 1; RAILROAD, 23; SCHOOL FUND MORTGAGE; TRADE-MARK.

1. *Lawful Business.—Nuisance.*—In order that a person may be restrained by injunction from commencing the operation of a business in itself legitimate, it must appear that the defendant threatens and intends to conduct the business in a manner which will constitute a nuisance.
2. *Same.—Blacksmith Shop.—Complaint by Adjacent Proprietor.—Presumption that Business will be Properly Conducted.*—The business of blacksmithing and horseshoeing is lawful and not in itself a nuisance, and the presumption is that one about to engage therein will conduct the same in a proper manner; therefore, a complaint for injunction alleging that the defendant is constructing a building on his lot adjacent to the plaintiff's residence for the purpose of carrying on such business, is bad if it fails to aver as a fact that the defendant threatens or in-

Bowen v. Mausy, 258

tends to conduct the same improperly, or that it can not be conducted at such place without material injury to the plaintiff. *Ib.*

INSANITY.

See CRIMINAL LAW, 8 to 10, 12; DECEDENTS' ESTATES, 10, 11.

INSTRUCTIONS TO JURY.

See CRIMINAL LAW, 4, 10 to 13, 20 to 22; PRACTICE, 7; RAILROAD, 21; TENDER, 2.

1. *Modification.*—The trial court, before giving an instruction asked by a party, may modify it so as to make it apply properly to the evidence. *Smith v. State, ex rel., 167*
2. *Written Communication.—Answer to Interrogatories.*—Where a jury, after retirement for deliberation, send a communication to the court that an interrogatory submitted to them embraces two questions, capable of being answered differently, and ask whether they are required to answer the whole interrogatory *yes* or *no*, the court may properly instruct them that they may answer part of the question *yes* and part *no*, if the evidence warrants it; but such instruction should be given by calling the jury into open court, and not by written communication sent to the jury-room. *Low v. Freeman, 341*
3. *Supreme Court.—Practice.*—Where the instructions given are not all in the record, a judgment will not be reversed on account of those which are in the record, although inaccuracies appear therein, unless they are so palpably erroneous that no supposable instructions could cure them. *Marshall v. Newark, 377*
4. *Same.—Joint Objection to.*—If two appellants jointly object to instructions given, the judgment will not be reversed if the instructions are only erroneous as to one. *Ib.*
5. *Inapplicability to Evidence.*—It is not error to refuse to give an instruction where no evidence is before the jury to which it is applicable. *Spence v. Board, etc., 573*

INSURANCE.

See BENEFIT SOCIETY; LIFE INSURANCE; SALE, 6.

1. *Ownership of Property.—Pleading.*—An allegation in a complaint on an insurance policy that the plaintiff, from the date of the risk until the destruction of the property by fire, "had an insurable interest as the owner thereof to its full value," is a sufficient averment of ownership. *Phoenix Ins. Co. v. Rowe, 202*
2. *Same.—Abstract of Title.*—A plaintiff in an action upon an insurance policy can not be required to furnish an abstract of his title, in pursuance of section 363, R. S. 1881. *Ib.*
3. *Same.—Execution of Policy.—Failure to Deny Under Oath.—Interrogatories to Jury.*—A failure to deny the execution of the policy, which is properly set out as the foundation of the action, by a pleading under oath, is so far an admission of its execution as to preclude further controversy on that subject, and interrogatories to the jury upon the subject of its delivery are irrelevant, and answers thereto can not overthrow the general verdict. *Ib.*

INTENT.

See ASSAULT AND BATTERY, 2, 3; BICYCLE.

INTERROGATORIES TO JURY.

See INSTRUCTIONS TO JURY, 2; INSURANCE, 3; VERDICT, 1.

INTOXICATING LIQUOR.

See CRIMINAL LAW, 1 to 3, 14, 15.

JUDGMENT.

See APPEAL, 4; ATTACHMENT AND GARNISHMENT; ATTORNEY AND CLIENT; CONTRACT, 1, 2; COSTS; DECEDENTS' ESTATES, 17; JURISDICTION, 1; MARRIED WOMAN, 3; PLEADING, 9; PRACTICE, 5; QUIETING TITLE, 3; SUBROGATION; SUPREME COURT, 11.

1. *Payment by Conveyance of Property.—Rights of Sureties.*—Where a judgment surety has become the owner of the judgment, and afterwards takes a conveyance, importing a money consideration, of real estate from his principal, an order of the court, made at the suit of a co-surety, declaring the judgment satisfied, will not be sustained unless it is shown that the property so conveyed by the principal was in payment of the judgment. *Keiser v. Beam, 31*
2. *Same.—Conveyance of Property to Surety.—Satisfaction as to Co-Surety.*—Where a principal judgment debtor conveys to a surety, who has become the owner of the judgment by assignment, real estate upon which the judgment is a lien, in consideration of the payment by the surety of liens prior to the judgment, the judgment can not be declared satisfied as to a co-surety beyond the one-half of the value of the property in excess of the amount of the liens which the grantee agreed to pay. *Ib.*
3. *Justice of the Peace.*—The conclusion of a justice of the peace in a case tried before him is not a judgment until it is entered of record. *Emery v. Royal, 299*
4. *Same.—Attachment.—Judgment Against Garnishee.*—If the only judgment rendered against an attachment defendant is a personal one, the garnishee defendant must be discharged, and any judgment against him is void. *Ib.*
5. *Same.—Payment of Money by Garnishee.—Negligence.*—It is the duty of a garnishee defendant before paying money to know that a proper judgment has been rendered; and if through his negligence he sustains loss, he must bear it. *Ib.*
6. *Same.—Illiterate Person.—Examination of Records.*—Reasonable diligence requires that a person who can not read shall procure one who can read to examine the record to ascertain whether or not a judgment has been rendered against him. *Ib.*
7. *Former Adjudication.—Conclusiveness of.*—An adjudication in a prior action is conclusive not only as to what was actually decided therein, but also as to every other matter which the parties might have litigated in the case. *Wilson v. Buell, 315*
8. *Same.—Contract.—Merger.*—The judgment in an action upon a contract merges the contract as a cause of action for all existing breaches, and another action therefor can not be maintained. *Ib.*
9. *Same.—Parties.*—To make a judgment effective as a bar to a subsequent action, it is not necessary that the parties to both actions shall be identical. It is sufficient if the parties to the pending action were before the court in the prior action and bound by the judgment therein rendered. *Ib.*
10. *Same.—Joint and Several Liability of Defendants.*—A plaintiff, although his complaint counts upon a joint obligation, has the right to offer evidence to show a separate liability as to one of the defendants, and, this being so, the judgment rendered in the action will be a bar to a subsequent action against one counting upon his separate liability. *Ib.*
11. *Res Adjudicata.*—An adjudication once had between the parties bars all future litigation, not only as to what has been actually litigated and determined, but as to all matters within the issues that might have been litigated and determined in the action. *Wright v. Anderson, 349*

12. *Same.—Merger.*—Where the gravamen of the action is one entire, indivisible contract or wrong, the doctrine of merger applies, and when the action is once brought, tried and determined, all causes of complaint are forever cut off, whether embraced within the issues or not. *Id.*

JUDICIAL NOTICE.

See SWAMP LAND, 2.

Law of Another State.—Pleading and Proof.—The law of another State, whether declared by judicial decisions or otherwise, if relied on to defeat an action alleged to have accrued in that State and sought to be enforced here, must be pleaded and proved, as judicial notice thereof will not be taken for such purpose.

Cincinnati, etc., R. R. Co. v. McMullen, 439

JUDICIAL SALE.

See CONTRACT, 6; DESCENT; PRINCIPAL AND SURETY; PROMISSORY NOTE, 7; SHERIFF'S SALE.

JURISDICTION.

See CRIMINAL LAW, 3; DECEDENTS' ESTATES, 1, 15 to 17; REPLEVIN, 1; SUMMONS.

1. *Injunction.—Process of Another Court.—Annulment of Judgment.*—The circuit court of one county has no jurisdiction of an action by a judgment debtor to annul a judgment rendered by the circuit court of another county, or to enjoin the levy of an execution issued thereon.

Plunkett v. Black, 14

2. *Justice of Peace.—Appearance.—Waiver.*—A party who appears before a justice of the peace and participates in a trial before him, can not object in the Supreme Court, for the first time, that the justice had no authority to try the case.

Taggart v. Ratts, 138

3. *Actions for Personal Injuries.*—Actions for the recovery of damages for personal injuries, or for pecuniary loss resulting from the death of a person by the wrongful act of another, are transitory in character, and arise out of the violation of rights which are neither local nor confined to the State where they accrued.

Cincinnati, etc., R. R. Co. v. McMullen, 439

4. *Same.—Rights Accruing in Another State.*—The jurisdiction of courts to entertain actions or enforce rights which accrued in a foreign State does not depend upon whether the rights are of statutory or common law origin, provided they accrued under a statute similar in import and character to one in force in the jurisdiction in which the remedy is sought. *Id.*

5. *Circuit Court.—Pleading.—Complaint.*—As the circuit court is a court of general and superior jurisdiction, its authority to proceed in the trial of a cause need not affirmatively appear in the complaint.

Chapell v. Shuee, 481

JURY.

See CRIMINAL LAW, 20; INSTRUCTIONS TO JURY.

JUSTICE OF THE PEACE.

See CRIMINAL LAW, 3; JUDGMENT, 3 to 6; JURISDICTION, 2.

Garnishment.—Compromise.—Fraud.—Liability on Bond.—Where one summoned as a garnishee in a proceeding before a justice of the peace, assuming that a judgment has been rendered against him, when in fact there is none, voluntarily pays to the justice the amount of a promissory note which he owes to the principal defendant, and afterwards has to pay the amount of the note to an assignee thereof, in the absence of fraud he has no cause of action upon the justice's bond, and

a compromise agreement made by the justice and his sureties to repay him the amount recovered by the assignee is without consideration, and not enforceable. *Emery v. Royal*, 299

LANDLORD AND TENANT.

See APPEAL BOND.

Contract.—Written Lease.—Contemporaneous Parol Agreement.—Evidence.—Damages.—Counter-Claim.—In an action by a lessor, alleging breaches by the defendant of a written contract of lease, which appears on its face to be complete, and not dependent upon, or collateral to, any other contract, the defendant will not be permitted to prove, by way of counter-claim or recoupment, a contemporaneous parol agreement by the lessor to ditch the land embraced in the lease, and damages resulting to him from a breach thereof, as a written contract can not be thus varied or contradicted. *Diven v. Johnson*, 512

LARCENY.

See CRIMINAL LAW, 16, 17.

LEASE.

See LANDLORD AND TENANT.

LETTERS-PATENT.

See SWAMP LAND.

LIBEL.

1. *What Constitutes.—Distinguished from Slander.*—It is not necessary that the words used in a published article should be slanderous, to maintain an action for libel. Any publication that tends to degrade, disgrace, or injure the character of a person, or bring him into contempt, hatred, or ridicule, is as much a libel as though it contained charges of infamy or crime. It is a libel to charge that a county officer published a false verified statement of the financial condition of the county. *Prosser v. Callis*, 105
2. *Same.—Slanderous Words.—Evidence.—Person Referred to.—Opinion of Hearers.*—Where slanderous words are written or spoken of one, by indirection, and are read or heard by persons conversant with the facts, it is competent to prove by such persons, who, in their opinion, was referred to by the language used. *Ib.*

LICENSE.

See MUNICIPAL CORPORATION, 3.

LIEN.

See CORPORATION, 2; COUNTY RECORDER; DECEDENTS' ESTATES, 13, 14; DRAINAGE; FIXTURES; JUDGMENT; MORTGAGE; RAILROAD, 28; REAL ESTATE, 1 to 5; SCHOOL FUND MORTGAGE.

LIFE INSURANCE.

See BENEFIT SOCIETY.

1. *Payment of Premiums.—Forfeiture.*—An insurance company will not be permitted to insist upon a forfeiture, if by any agreement, either express or implied by the course of its conduct, it leads the insured honestly to believe that the premiums or assessments will be received after the appointed day. *Sweetser v. Odd Fellows, etc., Ass'n*, 97
2. *Same.—Waiver of Payments.—Estoppel.*—Mere occasional voluntary indulgence on the part of an insurance company, in the absence of an express or implied agreement to waive payment of assessments according to the conditions of the contract, can not justly be construed

as a permanent waiver. But such a course of dealing may be pursued as will estop the company to say that there was no agreement. *Ib.*

3. *Same.—Declarations of Officers.*—It is immaterial what the officers of the company may have told the insured concerning his delinquency, and its effect upon his certificates, provided the course of dealing of the association, and the acts and declarations of its agents, were such as to induce him to believe that the time of payment would be extended as theretofore. *Ib.*

LIMITATION OF ACTIONS.

See STATUTE OF LIMITATIONS.

LIQUOR SHOP.

See CRIMINAL LAW, 1 to 3, 15.

MANDAMUS.

1. *Prison Warden.—Warrant for Fuel Purchased.*—The warden of a State prison may be compelled by mandate to draw a warrant for fuel purchased for the prison by his predecessor, it being the duty of the warden, under sections 6140 and 6141, R. S. 1881, to purchase fuel and pay for it by drawing a warrant. *Patton v. State, ex rel., 585*
2. *Same.—Return.—Fraud.—Mistake.*—A return by the warden alleging that the claim was rejected by the directors of the prison because they adjudged that there were improper weights, mistakes in calculations and inferiority in the quality of the fuel, but not alleging that there actually was fraud or mistake, is bad. *Ib.*

MARRIED WOMAN.

See HUSBAND AND WIFE; MORTGAGE, 1 to 4; STATUTE OF LIMITATIONS, 2.

1. *Mortgage.—Invalid unless Lawful Husband Joins.—Estoppel.*—Where a woman, whose husband has been absent and not heard of for more than seven years, assumes that he is dead and marries another man, and while cohabiting with the latter, and claiming him to be her husband, executes a mortgage upon her separate real estate, in which he joins, she may, upon the subsequent return of her lawful husband, and the resumption of marital relations with him, defeat the mortgage by a plea that he did not join therein as required by law, there being no ground for the application of the doctrine of estoppel. *Cook v. Walling, 9*
2. *Same.—Estoppel under Act of 1881.—Prior Contract.*—The statute of 1881 providing that married women shall be bound by an estoppel *in pais*, has no application to prior contracts. *Ib.*
3. *Judgment.—Estoppel.*—A married woman is bound by the decree of a court of competent jurisdiction, in a suit in which she is a party, the same as a *feme sole*. *Ratliff v. Stretch, 526*

MASTER AND SERVANT.

See ATTACHMENT AND GARNISHMENT; RAILROAD, 2, 10, 11, 16 to 22.

1. *Safety of Place of Employment.—Duty of Employer as to.*—It is the duty of an employer to use ordinary care and reasonable skill to make safe the place where he requires his employees to work. *Brazil Block Coal Co. v. Young, 520*
2. *Same.—Delegation of Duties.—Master's Liability.*—An employer can not escape liability by delegating to another the performance of the duties resting upon him in the capacity of employer. *Ib.*
3. *Same.—Minor.—Neglect of Master.—Necessary Averments in Complaint.*—Where a minor is injured by reason of the alleged neglect of his employer, a complaint by his father for damages must show one of three

things: (1st) That the child was too young to be put to the service he was required to perform; or (2d) that neither he nor the plaintiff had notice or knowledge of the augmented danger caused by the master's neglect; or (3d) that the master, knowing the age and inexperience of the child, neglected to give him the necessary warning and instruction. *Ib.*

4. *Same.—Pleading.—Complaint.—Averment of Freedom from Contributory Negligence.—Effect of.*—An averment in a complaint that the plaintiff was free from contributory negligence does not show actionable negligence on the part of the defendant. *Ib.*

5. *Same.—Complaint.—Culpable Negligence.—Averment as to.*—Such facts must be alleged in the complaint as affirmatively show the defendant to be guilty of culpable negligence, for otherwise his act is not actionable, even if the injured person was entirely free from fault. *Ib.*

MEASURE OF DAMAGES.

See CONTRACT, 13, 14; COUNTY RECORDER; DRAINAGE, 5.

MERGER.

See JUDGMENT, 8, 12.

MISTAKE.

See MANDAMUS.

Drainage Proceeding.—Description of Land.—A clerical mistake in the description of land in drainage proceedings may, while the proceedings are *in fieri*, be corrected by the court on petition or motion of the parties, or on its own motion. *Steele v. Hanna, 333*

MORTGAGE.

See DECEDENTS' ESTATES, 13, 14; DRAINAGE, 8; EMBLEMENTS; FIXTURES; MARRIED WOMAN; REPLEVIN, 4; SCHOOL FUND MORTGAGE; SHERIFF'S SALE, 1; SUBROGATION.

1. *To Indemnify Endorser.—Married Woman.—Inchoate Interest.*—Where a married woman has joined her husband in the execution of a mortgage on his real estate to indemnify an endorser upon the note of her husband, or of him and others, she may, in a suit to foreclose the mortgage, avail herself of any valid legal or equitable defence to protect her inchoate interest in the real estate. *Crawford v. Hazelrigg, 63*
2. *Same.—Promissory Note.—Alteration.—Extension of Time of Payment.—Release of Wife's Inchoate Interest.*—Where, after the execution of an indemnifying mortgage by a husband and wife to secure an endorser for the husband and others, the note upon which the mortgagee is endorser is, with his consent, but without the consent of the wife, so changed that one of the makers is released from liability, the inchoate interest of the wife is fully discharged from the lien of the mortgage; but the mere extension of the time of payment for a definite time and for a valuable consideration, all the parties to the note, including the endorser, consenting, will not have that effect. *Ib.*
3. *Same.—Disability of Married Woman.—Executory Contract.*—Under the law of this State, as it was in 1877, a married woman could not bind herself by an executory contract, and hence a provision in a mortgage in which she joined, that "the mortgagors expressly agree to pay the sum of money above secured and hold the mortgagee harmless therefrom," was not binding upon her. *Ib.*
4. *Same.—Statute of Limitations.*—Where a mortgage in suit contains an express agreement by the mortgagor to pay the sum of money secured thereby, an answer setting up the six years clause of the statute

of limitations in bar of the suit is bad on demurrer for the want of facts. *Ib.*

5. *Payments.—Application of.—Forfeiture.*—Where the owner of real estate, who is indebted to the mortgagee thereof only to the extent of the mortgage debt, pays sums of money to the mortgagee from time to time, a part of which is ostensibly for rent, with no agreement as to where the money so paid shall be applied, except that if the mortgagor shall pay the mortgage debt within a certain time the sums paid as rent shall be applied thereon, such payments will, in the absence of a stipulation for a forfeiture, be applied upon the mortgage debt. *Brake v. Sparks, 89*
6. *Resort to Property Not Embraced in.—Junior Lien-Holder.*—A mortgagee holding a lien on a single tract of land can not be compelled by a junior lien-holder to resort to property not embraced in his mortgage. *State, ex rel., v. Anna Life Ins. Co., 251*
7. *Deed Absolute on Face.—Finding of Trial Court.*—A finding by the trial court that a deed, absolute on its face, was given merely as a mortgage to indemnify the grantee against loss as surety for the grantor, will not be reviewed on appeal if there is evidence tending to support it. *West v. Hayes, 290*
8. *Same.—To Indemnify Surety.—Appeal Bond.—Taxes Paid by Mortgagee Pending Appeal.*—Where a person executes a mortgage to indemnify a surety on an appeal bond, the mortgagee, although he suffers no other loss, is entitled to enforce the lien of the mortgage to the extent of taxes paid by him on the real estate pending the appeal. *Ib.*
9. *Contemporaneous Written Instrument.—Parol Evidence.—Admissibility of to Explain.*—When property is conveyed by husband and wife by warranty deed—there having been previous money transactions between the parties to the deed—and on the same day the grantee takes the promissory note of the husband, and executes to him a title-bond, agreeing to convey to him said land upon the prompt payment of said note, the deed, note, and title-bond do not absolutely constitute a mortgage, and parol evidence is admissible to show the real transaction between the parties to said instruments. *Wolfe v. McMillan, 587*

MUNICIPAL CORPORATION.

1. *Negligence.—Liability.*—A recovery can be had against a municipal corporation only where it negligently performs or fails to perform a ministerial duty imposed by law. *City of Anderson v. East, 126*
2. *Same.—Dangerous Walls.—Injury to Citizen's Property.*—A municipal corporation is not liable to a citizen, whose building stands on a public alley, for damages sustained by him by reason of the walls of a building, standing on the opposite side of the alley, belonging to another citizen, and negligently permitted by him to become dangerous, falling upon his building and destroying it. *Ib.*
3. *Ordinance.—License Fees.*—An ordinance in reference to the licensing of a place of amusement is invalid if a fixed and definite license fee is not named therein, which all persons engaged in like business must pay, and if it does not state the time of the duration of the license to be issued. *Bills v. City of Goshen, 221*
4. *Same.—Defective Ordinance.—How Cured.*—A defective ordinance can not be remedied on motion of a member of the common council. If the defects can be supplied by the passage of another ordinance, such supplemental ordinance must be published before it can be effective. *Ib.*
5. *Same.—Penalty.*—A provision in an ordinance, fixing the penalty at a maximum amount, is valid. The court or jury trying the cause may

fix the penalty within the bounds prescribed, with the right to vary in amount, owing to the gravity of the offence. *Ib.*

6. *Negligence.—Sidewalk.—Visible Defect.—Contributory Negligence*—A city is not liable to one who sustains an injury by reason of a defective sidewalk, if the latter could have avoided the injury by looking, and shows no excuse for failing to look. *City of Plymouth v. Milner, 324*

MUTUAL BENEFIT SOCIETY.

See BENEFIT SOCIETY.

NEGLIGENCE.

See ATTORNEY AND CLIENT; COUNTY RECORDER; DRAINAGE, 6; JUDGMENT, 5, 6; MASTER AND SERVANT; MUNICIPAL CORPORATION, 1, 2, 6; RAILROAD, 1 to 22; SCHOOL FUND MORTGAGE; TOWNSHIP.

1. *Railroad.—Danger Signals.—Contributory Negligence*.—Although a railway company may be negligent in failing to give proper warning of the approach of a train, a person injured can not, nevertheless, recover unless it be affirmatively shown that he was free from contributory negligence. *Ohio, etc., R. W. Co. v. Hill, 56*
2. *Same.—Negligence per se*.—If, by looking, he could have seen an approaching train in time to escape, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is held negligence *per se*. *Ib.*
3. *Dangerous Walls.—Liability of Owner*.—Where two citizens own buildings on opposite sides of a public alley in a city, and the owner of one, after it has been burned, negligently permits the ruined walls to become dangerous, he is liable to the adjacent owner for injury to his property caused by the walls falling upon it, although the city marshal volunteered to take charge of the ruins and have the walls torn down, if necessary. *City of Anderson v. East, 126*

NEW TRIAL.

See BASTARDY; CRIMINAL LAW, 18; PRACTICE, 1, 2, 8 to 10; SUPREME COURT, 10.

1. *As of Right.—Notice*.—The failure of a party obtaining a new trial as of right, under section 1064, R. S. 1881, to give the notice to the opposite party required by section 1065, is not ground for vacating the order granting the new trial. *Nüche v. Earle, 270*
2. *Newly Discovered Evidence*.—To entitle a party to a new trial on account of newly discovered evidence, it must be shown that such evidence is true, and that it could not, with reasonable diligence, which must be shown, have been discovered and produced at the trial. *Ward v. Voris, 368*
3. *Same.—Diligence*.—A party seeking a new trial on the ground of newly discovered evidence must affirmatively show facts that will constitute diligence; and if he has made no effort to ascertain or procure the evidence, he must show an absence of knowledge of facts and circumstances which require him to make inquiry, and such a state of facts as will excuse his inactivity. *Ib.*
4. *Exclusion of Evidence*.—Where the exclusion of evidence is made a ground for a new trial, the particular evidence excluded must be designated and pointed out with reasonable certainty in the motion. *Isler v. Bland, 457*

NON-RESIDENT.

See STATUTE OF LIMITATIONS, 4.

Attendance at Trial in this State.—Service of Summons Upon.—A person who comes into this State for the purpose of testifying as a witness in an

action in which he is a party, can not be legally served with a summons at the suit of the party, plaintiff in the action he came here to defend. Section 312, R. S. 1881, does not apply to such a case.

Wilson v. Donaldson, 356

NOTICE.

See BENEFIT SOCIETY, 6; CONSTITUTIONAL LAW, 1, 2; JUDICIAL NOTICE; NEW TRIAL, 1; PARTITION, 4; PRINCIPAL AND SURETY; PROMISSORY NOTE, 1, 6; REAL ESTATE, 1; SUPREME COURT, 9; TAXES, 1 to 3.

NUISANCE.

See INJUNCTION.

OFFICE AND OFFICER.

See COUNTY COMMISSIONERS; COUNTY RECORDER; MANDAMUS.

ORDINANCE.

See MUNICIPAL CORPORATION, 3 to 5.

PARTIES.

See DECEDENTS' ESTATES, 12; JUDGMENT, 9.

PARTITION.

See DECEDENTS' ESTATES, 11; REAL ESTATE, 12.

1. *Counter-Claim.—Time of Filing.—Practice.*—If a defendant in partition proceedings desires to set up a claim for improvements made and taxes paid, the better practice is to file his counter-claim when he files his answer, and not after a finding has been made on the issue joined on the complaint. *Alleman v. Hawley, 532*
2. *Same.—Sale and Distribution.*—The plaintiff in partition proceedings, where the real estate is found to be not susceptible of division, can not be required to pay the defendant for his interest in the property, or for improvements made or taxes paid by him thereon, as, in such case, it is the right of the plaintiff to have the real estate sold and his share of the proceeds distributed to him. *Ib.*
3. *Same.—Improvements.—Taxes.*—Where the plaintiff in an action for partition is the owner of two-ninths of the property, exclusive of improvements made thereon by the defendant—who also sets up a claim for taxes paid—such plaintiff, upon the real estate being ordered sold as not susceptible of division, is entitled to receive from the commissioner two-ninths of the value of the real estate, exclusive of the improvements, less costs adjudged against him and less two-ninths of the taxes paid by the defendant on the real estate, exclusive of the improvements. *Ib.*
4. *Same.—Improvements Made with Notice of Co-Tenant's Title.*—The right of a tenant in common to compensation for improvements made by him is not a legal right, depending upon a statute, but is a right enforceable in a court of equity, and the fact that the improvements were made after notice of the co-tenant's title will not defeat a recovery. *Ib.*

PARTNERSHIP.

See EXEMPTION FROM EXECUTION; PROMISSORY NOTE, 4.

Sale by One Partner to Another.—Agreement to Pay Firm Debts.—A sale by one partner to another of his interest in the firm property, the purchasing partner agreeing in consideration of the transfer to pay the firm debts, vests title in the latter, in the absence of fraud, and he becomes individually liable to the partnership creditors.

Goudy v. Werbe, 154

PAYMENT.

See EVIDENCE, 4; JUDGMENT, 1, 2, 5, 6; MORTGAGE, 5.

PENALTY.

See CONSTITUTIONAL LAW, 3; MUNICIPAL CORPORATION, 5; TAXES, 6 to 8.

PERSONAL PROPERTY.

See FIXTURES; REPLEVIN; SALE; SHERIFF'S SALE, 2 to 6.

PLEADING.

See APPEAL, 3, 4; ASSAULT AND BATTERY, 1; CONTRACT, 5; CRIMINAL LAW; DECEDENTS' ESTATES, 9; INJUNCTION, 2; INSURANCE, 1, 3; JUDICIAL NOTICE; JURISDICTION, 5; MASTER AND SERVANT, 3 to 5; PARTITION, 1; PRACTICE; QUIETING TITLE, 1, 4; RAILROAD, 8, 9, 11; REPLEVIN, 2, 3; SPECIAL FINDING, 2, 5; TRUST AND TRUSTEE, 1.

1. *Written Instrument.—Exhibit.—Practice.*—A written instrument which is filed with a complaint, but is not the foundation of the action, is not a part of the pleading and will not be considered in aid of it.

Plunkett v. Black, 14

2. *Reply.—New Matter.—Departure.*—A departure occurs when the reply is inconsistent with the case made in the complaint, or when, in a second or subsequent pleading, a party abandons the ground he took in his last antecedent pleading, and resorts to another. But it is not a departure to set up new matter by way of replication, or additional facts, not inconsistent with those averred in the complaint.

Sweetser v. Odd Fellows, etc., Ass'n, 97

3. *Amended Complaint.—Refusal of Leave to File.*—It is not error on the part of the trial court to refuse leave to a plaintiff to file an amended complaint, after all the evidence has been introduced, which involves an entire change in the theory of the plaintiff's case.

Lewark v. Carter, 206

4. *Practice.—Amended Complaint.—Motion to Reject.—Discretion of Trial Court.*—Where it is not shown that the trial court abused its discretion in permitting an amended complaint to be filed, no available error can be predicated on its refusal to strike it out.

Grand Rapids, etc., R. R. Co. v. Ellison, 234

5. *Demurrer.—Sufficiency of.*—A demurrer to a complaint, alleging for the reason thereof "that the petition does not state facts sufficient to constitute a good and sufficient petition," does not set forth any statutory cause for demurrer.

Grubbs v. King, 243

6. *Demurrer.*—A demurrer addressed to an entire pleading containing one good paragraph should be overruled. *City of Plymouth v. Milner, 324*

7. *Assault and Battery.—Complaint for Damages.—Venue.*—A complaint for damages for assault and battery need not state the county in which the assault was committed.

Sullivan v. Jones, 327

8. *Answer.—Cross-Complaint.*—A pleading, though denominated an answer, will be regarded as a cross-complaint if facts are alleged therein which authorize the granting of affirmative relief.

Wright v. Anderson, 349

9. *Complaint.—Theory.—Judgment.*—A complaint must proceed upon a definite theory, the cause must be tried on the theory constructed by the pleadings, and such a judgment as the theory selected warrants must be rendered, and no other or different one. *Feder v. Field, 386*

10. *Same.—Fraud.—Damages.*—A complaint seeking a recovery against some of the defendants upon a money demand for goods sold and delivered, and auxiliary equitable relief against other defendants as fraudulent judgment plaintiffs and vendees, does not entitle the plaintiff to a judgment for damages against all the defendants. *Id.*

11. *Motion to Strike Out.—Supreme Court.*—The overruling of a motion to strike out part of a pleading, or a paragraph of pleading, as surplus-

age, and for the reason that the same evidence may be given under another paragraph, does not constitute error for which a judgment will be reversed. *Colglazier v. Colglazier*, 409

12. *Same.—Answer.—Avoidance and Denial.*—A paragraph of answer may confess and avoid part of the allegations of the complaint and deny the others. *Ib.*
13. *Complaint.—Defects Curable by Proof.—Motion in Arrest of Judgment.*—A complaint will withstand a motion in arrest of judgment if it is sufficient to bar another action for the same cause and if the defects therein are such as may be supplied by proof. *Chapell v. Shuce*, 481
14. *Uncertainty.—Motion to make Specific.—Practice.*—The remedy for want of certainty in a pleading is by a motion to make it more specific. *Ratliff v. Stretch*, 526
15. *Demurrer.—Harmless Error.*—There is no available error in overruling a demurrer to an insufficient paragraph of cross-complaint, where no relief is granted the cross-complainant under that paragraph. *Royce v. Turnbaugh*, 539

PRACTICE.

See APPEAL; BASTARDY; CRIMINAL LAW; EVIDENCE, 2; INSTRUCTIONS TO JURY; JURISDICTION, 2; NEW TRIAL, 4; PARTITION, 1; PLEADING; QUIETING TITLE, 1, 4; SPECIAL FINDING; SUPREME COURT; TENDER; VERDICT; WITNESS.

1. *New Trial.—Excessive Damages.*—An assignment as a cause for a new trial that the damages are excessive, does not call in question the amount of the recovery in an action on contract, that assignment being applicable only in cases of tort. *McKinney v. State, ex rel.*, 26
2. *New Trial.—Excessive Damages.*—An assignment as a cause for a new trial that the damages are excessive, applies only to actions for tort, and is not applicable to actions on contract. *Smith v. State, ex rel.*, 167
3. *Transcript.—Copies of Instruments.*—When a paper is once copied into the transcript, it is not necessary to copy it again when introduced into subsequent parts of the record, provided it be so referred to that it can be identified with certainty. *Binkley v. Forkner*, 176
4. *Joint and Separate Exceptions.*—A joint exception can not be taken to distinct rulings, but an exception must be separately taken to each ruling. *Walter v. Walter*, 247
5. *Judgment.—Form.—Objection.*—An objection to the form of a judgment should point out wherein it is improper, and there should be a motion to modify it. *Ib.*
6. *Objections to Evidence.*—Objections to evidence, to be available, must be reasonably specific. *Ib.*
7. *Trial.—Failure of Plaintiff's Testimony to Support Complaint.—Dismissal of Action.—Instructing Jury to Return Verdict.*—A cause should not be dismissed on motion of the defendant because the plaintiff's testimony does not sustain the complaint; but, after the close of the evidence, the defendant may, if it is not sufficient, ask that the jury be instructed to return a verdict in his favor. *City of Plymouth v. Milner*, 324
8. *Admission of Evidence.—New Trial.—Supreme Court.*—Where the admission or rejection of evidence is not made a cause for a new trial, no question in relation thereto is presented on appeal. *Marshall v. Lewark*, 377
9. *New Trial.—Admission and Exclusion of Evidence.*—A cause for a new trial on account of the admission or exclusion of evidence, must specify the particular rulings complained of. *Queen Ins. Co. v. Studebaker Bros. Mfg. Co.*, 416
10. *Same.—Assessment of Damages.—Waiver.*—A question as to the amount

of damages assessed is waived if not assigned as cause for a new trial. *Ib.*

11. *Demurrer to Answer.—Harmless Error.*—Available error can not be predicated on a ruling sustaining a demurrer to one paragraph of an answer if the facts alleged therein are admissible in evidence under another paragraph which remains in the record. *Ratliff v. Stretch, 526*
12. *Exclusion of Testimony.—Reserving Question Upon.*—The exclusion of testimony can only be made available by asking some pertinent question of a witness on the stand, and, if objection be made, stating to the court what testimony the witness will give in answer to the question. *Spence v. Board, etc., 573*
13. *Same.—Subsequent Introduction of Excluded Evidence.—Error Cured.*—If evidence offered by the plaintiff in chief is excluded, but is afterwards introduced in contradiction of a witness for the defence and goes to the jury without any instruction limiting it to the matter of impeachment, its exclusion when first offered is a harmless error. *Ib.*
14. *Same.—Motion not Well Taken as a Whole.*—There is no available error in overruling an objection or a motion which is not well taken as a whole. *Ib.*
15. *Evidence.—Objection to.*—An objection to evidence, to be available, must be made when a question which seems to invite improper evidence is asked, and the particular evidence and the specific grounds of objection must be fairly pointed out and stated. *Vickery v. McCormick, 594*
16. *Same.—Motion to Strike Out.*—If objectionable evidence is volunteered by a witness, or given in an answer that is not responsive to the question asked, or otherwise, before objection can reasonably be made, a motion should be made to strike out the particular matter which is considered improper. *Ib.*

PREFERENCE OF CREDITOR.

See ASSIGNMENT FOR BENEFIT OF CREDITORS.

PRESUMPTION.

See APPEAL, 2; DEED 3; RAILROAD, 14, 18; SUPREME COURT, 3; SWAMP LAND, 2; TRADE-MARK, 2.

PRINCIPAL AND SURETY.

See BOND; JUDGMENT, 1, 2.

Subrogation.—Sheriff's Sale.—Redemption.—Innocent Purchasers.—Where a surety permits a judgment to be taken against him as a joint principal, and stands by until other persons, without notice of his rights other than that afforded by the record, have acquired title to the principal's property through the foreclosure of a prior mortgage, and have made valuable improvements thereon, he can not afterwards, having paid the judgment, establish his suretyship as against the good faith purchasers and be subrogated to the right of the judgment creditor, who was not a party to the foreclosure proceedings, to redeem from the sale thereunder. *Thomas v. Stewart, 50*

PRIORITY OF LIENS.

See DECEDENTS' ESTATES, 13, 14; DRAINAGE, 8; FIXTURES, 4, 5.

PROMISSORY NOTE.

See EVIDENCE, 4, 6; MORTGAGE, 1, 2, 9.

1. *Innocent Holder.—Wagering Speculations.—Margins.*—A negotiable note executed for the purpose of paying margins in a speculation in cotton futures, although void as between the parties on common law principles, is valid in the hands of a third person who takes it be-

fore maturity, for value and without notice of the purpose for which it was executed, unless declared to be void by statute. For statutes held not to invalidate such a note, see opinion.

Sondheim v. Gilbert, 71

2. *Same.—Lex Loci Contractus.*—Where a note is executed and made payable in another State, where the transactions of the parties who put the note in circulation are to be carried on, the law of that State must be looked to in determining its validity; and if valid there in the hands of an innocent holder, it will be enforced in this State, unless declared void by our statutes. *Ib.*
3. *Same.—Enforcement in this State.*—Commercial paper executed and issued in New York in the course of a speculation in cotton options in that State, will be enforced in this State in the hands of an innocent holder, neither the statutes of that State nor of this State declaring such paper void in the hands of such a holder. *Ib.*
4. *Same.—Partnership.—Commercial Paper Issued by One Partner.*—When a partnership is engaged in a course of business in which the use of commercial paper is appropriate, the firm is liable upon such paper in the hands of a *bona fide* holder, when issued in the firm name by one of its members, notwithstanding it may have been issued in violation of his duty, without the knowledge or consent of the other members. *Ib.*
5. *Judgment.—Assignment.—Endorser.*—Where the payee of a promissory note obtains a judgment thereon against the makers, which he assigns, he can not afterwards maintain an action on the note against an accommodation endorser. *Moorman v. Wood, 144*
6. *Same.—Who Prima Facie an Endorser.*—Where the name of one not the payee is written on the back of a negotiable promissory note, his situation is *prima facie* that of an endorser, and the payee is bound to take notice of his rights as such. *Ib.*
7. *Same.—Release of Endorser.—Redemption.—Contract.—Statute of Frauds.*—Where a creditor bids in the property of the debtor at a sale under a mortgage, and induces the latter not to redeem by promising to take a sheriff's deed and hold the land, which is of value sufficient to satisfy both his claim and the mortgage debt, as a security for the payment of his claim, but violates his contract, he can not afterwards maintain an action against a surety. Such a contract is not within the statute of frauds. *Ib.*

PUBLIC BUILDINGS.

See BOND.

PUBLIC POLICY.

See CONTRACT, 3, 4; SALE, 1, 2.

QUIETING TITLE.

See FRAUDULENT CONVEYANCE, 2; REAL ESTATE, 4 to 6; STATUTE OF LIMITATIONS.

1. *Defences Provable Under General Denial.—Special Answers.—Demurrer.—Practice.*—In suits to quiet title all matters of defence may be proved under the general denial, and hence there is no available error in sustaining a demurrer to special paragraphs of answer, although good. *O'Donahue v. Creager, 372*
2. *Same.—Adverse Possession.—Fraud.—Damages.—Statute of Limitations.*—Where one went into possession of real estate in 1852, claiming title and holding exclusive possession until 1885, when he conveyed to another, any right which one claiming to be the original owner may

have had to quiet title, or for damages for obtaining a fraudulent deed, is barred by the statute of limitations. *Ib.*

3. *Description.—Void Decree.*—A decree quieting title is void if the description of the land can not be ascertained from the record.
Ratliff v. Stretch, 526
4. *Same.—Defences Admissible under General Denial.—Harmless Error.*—In a suit to quiet title all defences may be given in evidence under the general denial, and, when it is pleaded, there is no available error in sustaining a demurrer to special paragraphs of answer. *Ib.*

RAILROAD.

See ATTACHMENT AND GARNISHMENT; CONTRACT, 8; NEGLIGENCE, 1, 2.

1. *Negligence.—Passenger.—Warning Engineer of Danger.*—A passenger who sees a train on an intersecting road approaching a crossing, is not guilty of contributory negligence because he fails to pull the bell-rope and warn the engineer of the danger.
Grand Rapids, etc., R. R. Co. v. Ellison, 234
2. *Same.—Incompetent Employee.—Knowledge of.*—In an action by a passenger to recover for injuries received in an accident caused by the negligence of a watchman in the employ of the defendant, it is no defence that the defendant had no knowledge of the watchman's incompetency until after the accident. *Ib.*
3. *Same.—Carrier and Passenger.—Degree of Care.*—A passenger is entitled to a safe transit, and the carrier is bound to the highest degree of reasonable care. *Ib.*
4. *Same.—Fireman.—Absence from Post.*—It is the duty of a fireman to be at his post of duty when his train is in motion, and where, by his neglect, an accident happens which could otherwise have been averted, the company is liable. *Ib.*
5. *Same.—Intersecting Road.—Stopping Train.*—It is the duty of an engineer, when approaching the crossing of an intersecting railroad, to stop his engine until it can be ascertained that the crossing is clear. *Ib.*
6. *Same.—Line of Duty.—Evidence.—Opinion.*—Whether an engineer was acting in the line of his duty at a given time is a question to be determined by the jury from the facts, and opinions of witnesses upon a supposable state of facts are not admissible. *Ib.*
7. *Same.—Prudence of Employees.*—A railroad company is not relieved of liability because its employees acted with reasonable prudence after discovering a danger which their negligence contributed in bringing about. *Ib.*
8. *Animals.—Complaint for Wilful Killing.—Evidence.*—For a complaint against a railroad company which is held to be sufficient as charging a wilful killing by the defendant of the plaintiff's cow, within the corporate limits of a city, and for evidence held not to be sufficient to sustain the complaint, see opinion.
Indiana, etc., R. W. Co. v. Overton, 253
9. *Same.—Pleading.—Theory.—Wilful and Negligent Injuries.*—Where the complaint seeks to recover for a wilful injury, the plaintiff can not, without other pleadings, shift his ground and recover upon the theory that the defendant was negligent. *Ib.*
10. *Negligence.—Defective Bridge.—Continuing in Service with Knowledge of.—Assumption of Risk.*—One in the service of a railroad company in the capacity of baggage-master, assumes the increased risk resulting from an insufficient bridge on the line of road over which he runs, and waives any claim upon the employer for damages, if he has notice of its dangerous character and thereafter voluntarily continues in the service.
Louisville, etc., R. W. Co. v. Sandford, 265

11. *Same.—Complaint.—Allegation that Employee was Ignorant of Danger.*—A complaint against a railroad company seeking to recover for the death of an employee, caused by the fall of a bridge beneath the train on which he was employed, which it is alleged the defendant had permitted to become unsafe, is bad unless it is averred that the intestate was ignorant of the unsafe condition of the bridge. *Ib.*
12. *Negligence.—Common Carrier.—Injury to Passenger.—Pre-existing Disease.*—The right of a passenger to recover for an injury caused by the negligence of a railroad company is not impaired by the fact that he was afflicted with Bright's disease at the time he was injured. *Louisville, etc., R. W. Co. v. Snyder, 435*
13. *Same.—Degree of Care Required of Carrier.*—Carriers are bound to use the highest practicable degree of care to secure the safety of passengers, and any omission to exercise that degree of care constitutes actionable negligence. *Ib.*
14. *Same.—Presumption of Negligence.—Burden of Proof.*—The burden of overcoming the presumption of negligence arising from evidence of the occurrence of an accident and injury to a passenger, is upon the carrier. *Ib.*
15. *Same.—Bridges.—Construction and Maintenance.—Inspection.*—A carrier, in the construction and maintenance of its bridges, can not rest upon the reputation of manufacturers and the external appearance of materials. It is bound to test and inspect such materials before they are put in place, and also from time to time during their use. *Ib.*
16. *Duty to Provide Safe Machinery.—Liability to Employee.*—It is the duty of a railroad company to provide and maintain reasonably safe and suitable cars and other appliances for its employees to work with, and a failure to discharge this duty, no matter to whom the company may have committed its performance, renders the company liable to an employee who is injured without his fault. *Cincinnati, etc., R. R. Co. v. McMullen, 439*
17. *Same.—Fellow Servants.—Car Inspector and Trainmen.*—A car inspector, in the employment of a railroad company, upon whom is enjoined the duty of inspecting the company's cars, is not a co-employee of a brakeman, or of a conductor of a freight train who, in the line of his service, is discharging the duties of brakeman, within the meaning of the common law rule exempting a master from liability for the negligence of a fellow servant. *Ib.*
18. *Same.—Freight Conductor.—Inspection of Cars.—Presumption.*—There is no legal presumption that it is the duty of the conductor of a freight train to inspect the cars and machinery of his train, or that he is chargeable with negligence for using unsafe cars if the defect was such that it might have been discovered by inspection. *Ib.*
19. *Same.—Evidence.—Rules of Company.*—Parol evidence that it was the duty of a freight train conductor on the defendant's road to inspect the couplings and brakes connected with his train, is not admissible, in the absence of a showing that such duty was not prescribed by a written or printed rule duly adopted and promulgated. *Ib.*
20. *Same.—Rules of Another Company.*—The rules of another separate and apparently independent railroad company are not competent evidence to show the duties of a conductor on the defendant's road, until it is shown by competent evidence that they had been adopted and promulgated as the rules of the defendant. *Ib.*
21. *Same.—Instruction to Jury.—Province of Court.*—It is not the province of the court to say to the jury as matter of law, in an action for damages, what facts and circumstances are sufficient to show that the death of the plaintiff's intestate was caused by defective machinery. *Ib.*

22. *Same.—Circumstantial Evidence of Injury.*—If, from all the facts and circumstances proved in the case, the inference arises that the deceased was exercising proper care, and that his death was caused while using a defective brake on one of his employer's cars, a recovery is justified, even though no direct evidence is given by persons who saw the accident. *Ib.*
23. *Unlawful Entry Upon Land.—Injunction.*—Where a railroad company is about to enter upon and take permanent possession of land, without first having acquired the right to do so, and without making compensation, injunction may be maintained by the land-owner.
Lake Erie, etc., R. W. Co. v. Michener, 465
24. *Same.—Right of Way.—Release.—Limitation of Width.*—Where a railroad company, by its charter, is authorized to acquire a right of way eighty feet wide, but accepts from a land-owner a release expressly limiting the right of way across his land to twenty-five feet, it can not thereafter in the absence of a further grant, assert a claim to a greater width, unless it has acquired title by adverse occupancy, or unless it has entered upon the land and occupied it under such circumstances that the owner is estopped from reclaiming possession. *Ib.*
25. *Same.—Estoppel.*—The fact that a land-owner gave permission to a railroad company to occupy, during his pleasure, certain ground adjacent to the right of way, with a turn-table and water-tank, does not estop him or his grantees, after the company has abandoned the ground so occupied, from asserting title when such company subsequently attempts to retake possession, not only of the parcel formerly occupied, but also of a strip of a defined width across the entire tract. *Ib.*
26. *Consolidation.—Liability of New Company for Antecedent Debts.*—Where a consolidation of railroad companies takes place, in pursuance of the statute, the corporation into which the original companies are so merged becomes liable for all the valid debts and obligations of the consolidated companies, and a judgment *in personam* may be rendered against it therefor.
Louisville, etc., R. W. Co. v. Boney, 501
27. *Same.—Execution.—What May Not be Sold.*—Neither the franchise and privileges of a railroad company, nor any lands, easements, or things essential to the existence of the corporation, or necessary to the enjoyment of its franchise, can be sold on execution or order of court to satisfy a judgment at law against it. *Aliter*, as to locomotives, cars and other personal property. *Ib.*
28. *Same.—Contractor.—Lien.—Enforcement.*—A contractor for the construction of a road-bed for a railroad company acquires, under the statute, a lien upon so much of the road-bed as is constructed by him, which may be foreclosed; but there is no statutory provision for the sale of the road as an entirety, or the franchise, or anything that would destroy or impair the use of the franchise, and while the corporation remains solvent payment must be enforced out of other property or funds in such appropriate manner as a court of equity may determine. *Ib.*

REAL ESTATE.

See APPEAL BOND; DECEDENTS' ESTATES, 10 to 14; DEED; DESCENT; DRAINAGE; EMBLEMENTS; EVIDENCE, 1, 6; FIXTURES; FRAUDULENT CONVEYANCE; GUARDIAN AND WARD, 2; MARRIED WOMAN, 1; MISTAKE; MORTGAGE; PARTITION; PRINCIPAL AND SURETY; QUIETING TITLE; RAILROAD, 23 to 25; SCHOOL FUND MORTGAGE; STATUTE OF LIMITATIONS; SUBROGATION; SWAMP LAND; TRUST AND TRUSTEE, 2, 3; VENDOR AND PURCHASER.

1. *Lien Created by Will.—Notice to Purchaser.*—A purchaser of real estate is

chargeable with knowledge of a lien created thereon by a will which constitutes a link in his chain of title. *Manifold v. Jones, 212*

2. *Same.—Executor.—Charge Upon Land.—Extinguishment.—Innocent Purchaser.*—Where a testator devises land charged with the payment by the devisee of a sum of money to his estate, within a certain time, and the devisee, as executor of the will, charges himself with the sum to be paid by him, the charge on the land will be regarded as paid and extinguished as to subsequent good-faith purchasers. *Ib.*
3. *Same.—Settlement with Residuary Legatee.—Acquittance.*—A settlement between the devisee executor and the residuary legatee of the testator's personal property, wherein the latter executes an acquittance for the amount charged upon the land devised to the testator, extinguishes the lien as against a subsequent good-faith purchaser. *Ib.*
4. *Same.—Quieting Title.—Lien in Favor of Third Person.*—Where a complaint to quiet title alleges that the plaintiff is the owner of the land in fee, the defendant can not defeat the action by merely setting up an outstanding lien in favor of a third person. *Ib.*
5. *Same.—Right of Heirs to Enforce Lien.*—Heirs or devisees can not set up and enforce a lien in favor of a testator's estate, to defeat an action by a purchaser to quiet title, at least not without showing that the executor has neglected or refused to do his duty. *Ib.*
6. *Same.—Estate on Condition.—Forfeiture.*—An action to quiet title by one claiming the fee by conveyance from a devisee can not be defeated by the defendants on the ground that the devised estate was upon condition subsequent, unless they show that they are heirs and that they still own the reversion, as otherwise they are not entitled to enforce a forfeiture. *Ib.*
7. *Same.—Re-Entry.*—Courts will not enforce a forfeiture of an estate upon condition subsequent where there has been no proper exercise of the right of re-entry. *Ib.*
8. *Title.—Proof.—Common Source.*—Where a plaintiff and defendant claim land in controversy through a common source of title, it is sufficient for the plaintiff to deduce his title from the common source. *Nichols v. Earle, 270*
9. *Contract to Convey.—Specific Performance.—Demand.*—Where one who has contracted to convey real estate repudiates the contract, or denies the right of the other to receive a deed, a demand for a conveyance is not necessary before a suit to enforce specific performance. *Harshman v. Mitchell, 312*
10. *Same.—Defendant not Required to Make Demand.*—A party who is brought into court as a defendant and challenged to litigate matters in controversy, is not required to make a demand which might be necessary if he were the moving party. *Ib.*
11. *Same.—Tenant in Common.—Right to Specific Performance by Co-Tenant.*—One tenant in common, who has become the owner by assignment of a title-bond executed by himself and his co-tenant, may, upon performing the conditions of the bond, enforce specific performance of the contract to convey against his co-tenant. *Ib.*
12. *Parol Contract of Exchange.—Performance.—Statute of Frauds.—Estoppel.*—Where parties enter into a parol agreement to exchange part of their respective lots for the purpose of rectifying and straightening the boundary lines, and the agreement is fully carried into effect and possession surrendered, the transfer is valid, and the parties are estopped from asserting title to the ground which they have respectively exchanged. *Tate v. Foshee, 322*

REAL ESTATE, ACTION TO RECOVER.

See APPEAL BOND.

RECEIVER.

1. *Property in Possession.—Conversion.—Right to Sue for.*—A receiver has such a special or qualified interest in property of which he obtains possession in pursuance of an order of court as entitles him to maintain an action for its wrongful taking and conversion.
Kehr v. Hall, 405
2. *Same.—Property not in Possession.*—A receiver can not maintain an action for the conversion of property of which he has never acquired possession, and as to which he does not show himself entitled to possession, beyond an averment that he was directed by the court to take such property into his possession, although he alleges that it has been wrongfully taken and converted by the defendant. *Ib.*

RECORDING WRITTEN INSTRUMENT.

See COUNTY RECORDER; SWAMP LAND.

REDEMPTION.

See ATTORNEY AND CLIENT, 3; CONTRACT, 6; PRINCIPAL AND SURETY PROMISSORY NOTE, 7; SHERIFF'S SALE, 1.

RENTS.

See APPEAL BOND.

REPEAL OF STATUTE.

See COSTS, 2; DRAINAGE, 1, 3.

REPLEVIN.

See EVIDENCE, 4; SALE, 5.

1. *Property in Hands of Assignee.—Jurisdiction.*—One against whom a proceeding in replevin is brought in the superior court of a county can not, while failing to deny the allegation of the plaintiff's ownership and his own unlawful detention, oust the jurisdiction of that court by asserting that he holds the property solely in the capacity of assignee under the voluntary assignment law, and must be sued in the circuit court.
Martz v. Putnam, 392
2. *Complaint.—Description.*—A complaint in replevin describing the property as "one hundred bushels of wheat of the value of \$100, said wheat having grown in and harvested on the 23th and 29th of July, 1885, having been threshed off the following described real estate and the wheat ground situate thereon," describing the real estate, is sufficient after verdict.
Hall v. Durham, 429
3. *Same.—Verification of Complaint by Attorney.*—Under section 1547, R. S. 1881, a complaint in replevin need not be verified by the plaintiff in person, but it may be verified by the attorney for the plaintiff, as his agent. *Ib.*
4. *Same.—Mortgage.—Foreclosure.—Purchaser at Sheriff's Sale.—Crops.—Demands.*—A purchaser of land at sheriff's sale, under a decree of foreclosure, upon receiving a deed becomes entitled to the immediate possession of the premises, and crops thereafter sown and harvested by the mortgagor or his lessee, without the purchaser's consent, belong to the latter, and he may maintain replevin therefor without first making a demand. *Ib.*

RES ADJUDICATA.

See JUDGMENT, 7 to 12.

RIGHT OF WAY.

See RAILROAD, 24.

SALE.

See DECEDENTS' ESTATES, 10 to 14; EMBLEMENTS; PARTITION; PARTNERSHIP; SCHOOL FUND MORTGAGE; SHERIFF'S SALE.

1. *Contract.—Future Delivery.—Margins.*—A contract for the sale and future delivery of a commodity which may be procured in the market at the proper time, is valid, if it is the intention of the parties, or one of them, that the commodity shall actually be procured and delivered, and this is so, although money may be deposited, as a margin, to secure performance or as indemnity against loss. *Sondheim v. Gilbert*, 71
2. *Same.—Speculative Transactions.—Void Contracts.—Public Policy.*—If no delivery is contemplated, and the intention of the parties is merely to speculate on the rise or fall of the market, and adjust the account between them by paying or receiving the difference between the contract and current price, the contract is against public policy and void. *Id.*
3. *Delivery on Board Cars.—Vesting of Title.—Execution.*—Where one contracts to furnish materials of a certain quality to another, and to deliver them on board the cars consigned to the latter, who is a contractor for a county building, and who agrees to pay for the materials so agreed to be supplied if they are accepted by the board of commissioners and the architect, and materials are shipped in pursuance of the contract to the place of destination, where they are levied on in partial satisfaction of an execution against the consignee, the consignor, if he takes possession of the property while still subject to the levy, and disposes of it for his own benefit, is liable to the sheriff for its value, it being presumed, as against him, that the materials were of the kind which he had contracted to furnish, and title having vested in the consignee upon the delivery on board the cars as agreed. *Rechtin v. McGary*, 133
4. *Contract.—Personal Property.—Selection.—Delivery.—Vesting of Title.—Bailment.*—Where the contract for the sale of lumber, of a certain quality and designated dimensions, provides that the seller shall saw the same and pile it on sticks in his yard, subject to the order of the purchaser at any time, who is to pay for it when put on sticks, the seller agreeing to load it on cars when ordered by the purchaser, and in pursuance of the contract the timber is sawed, the lumber selected and put on sticks in the seller's yard, and paid for by the purchaser as invoices are rendered, the title thereby passes to the latter, and in subsequently loading the lumber upon the cars when ordered by the purchaser the seller acts as bailee, and not as owner. *Marta v. Putnam*, 392
5. *Same.—Setting Apart Too Much.—Rights of Purchaser.—Voluntary Assignment.—Title of Assignee.—Replevin.*—If, in making the selection of the lumber according to the contract, the vendor sets apart more than is called for by the agreement, and notifies the vendee that it is so set apart and subject to his order, there is a good delivery, and the title passes as to the quantity purchased, and the vendee has the right to take that much and refuse the balance; and if, before the property has been removed by the purchaser, but after it has been ordered shipped, the vendor makes an assignment of all his property for the benefit of creditors, the assignee acquires no title to such property, and the purchaser may maintain replevin. *Id.*
6. *Same.—Postponing of Title.—Insurance by Bailee.*—A stipulation in the contract that the seller should obtain insurance upon the lumber

while in his yard, and be responsible for any loss which might occur prior to the delivery on the cars, does not postpone the vesting of the title, the seller, as bailee, having an insurable interest. *Ib.*

SCHOOL FUND MORTGAGE.

Sale.—Injunction.—Secret Vendor's Lien.—Negligence of Auditor.—A complaint to enjoin a sale of land by a county auditor to satisfy a school fund mortgage, which shows that the plaintiff, after the mortgage was executed, purchased the land under the foreclosure of a secret vendor's lien antedating the mortgage, and alleges that the plaintiff, at the time the mortgage was executed, held a judgment against the mortgagor, but makes no claim of title under that judgment, and alleges further that the auditor in taking the mortgage failed to require an oath of the mortgagor, and a certificate of the clerk and recorder, that the land was unincumbered, and also failed to have the property appraised, as provided by law, is not sufficient to entitle the plaintiff to an injunction or to avoid the mortgage. For the complaint in full, see opinion. *Winstandley v. Crim, 328*

SET-OFF.

See TORT.

SHERIFF'S SALE.

See CONTRACT, 6; EMBLEMENTS; PRINCIPAL AND SURETY; PROMISSORY NOTE, 7; REPLEVIN, 4.

1. *Venditioni Exponas by Redemptioner.—Mortgage.—Wife's Rights.*—Where a judgment creditor redeems from a sale of a husband's property made under the foreclosure of a prior mortgage, in which the wife joined, and afterwards procures a sale to be made under his judgment on a *venditioni exponas*, and obtains a sheriff's deed to the property under the latter sale, the wife is not entitled to have one-third of the property set off to her as contemplated by section 2508, R. S. 1881, but the last sale is to be regarded, under section 773, as having been made upon the original decree, and the title acquired thereunder relates back to the date of the mortgage. *Patterson v. Rosenthal, 83*
2. *Personal Property.—Title Taken by Purchaser.*—The purchaser of personal property at a sale under execution takes only the title and interest of the judgment debtor. *Lewark v. Carter, 206*
3. *Same.—Defective Title.—Liability of Sheriff.*—There is no warranty in judicial sales, and if the sheriff sells personal property in good faith, he is not responsible to the purchaser for any defect in the title. *Ib.*
4. *Same.—Liability of Execution Plaintiff.—Representations of Deputy Sheriff.*—Representations by a deputy sheriff at the time of selling personal property that the title is good, will not render the execution plaintiff liable to a purchaser, upon a failure of title, unless the representations were made by his procurement. *Ib.*
5. *Same.—Sheriff's Liability for Representations of Deputy.*—A sheriff is not liable to a purchaser, on account of representations made by his deputy as to title, where the statements are made in good faith in the belief that they are true, as in such case there is no fraud. *Ib.*
6. *Same.—Duty and Authority of Deputy.*—Statements made by a deputy sheriff concerning the title to property offered for sale on execution, are outside of his duty and authority. *Ib.*

SIDEWALK.

See BICYCLE; MUNICIPAL CORPORATION, 6.

SLANDER.

See LIBEL.

SPECIAL FINDING.

See INSTRUCTIONS TO JURY, 2.

1. *Exception to Conclusions of Law.—Admission as to Facts.*—A party by excepting to conclusions of law drawn by the court from a special finding of facts, admits that the finding is full and correct.
State, ex rel., v. Vogel, 188
2. *Same.—Pleading.—Supreme Court.—Practice.*—Where a plaintiff's case must stand or fall by the facts specially found by the court, and admitted to be correctly found, an alleged error in overruling a demurrer to an answer will not be considered on appeal. *Ib.*
3. *Part of Record.*—A special finding made by the court upon the request of the parties becomes a part of the record, without more.
Wilson v. Buell, 315
4. *Requirements of.*—Every fact necessary to the plaintiff's recovery must be found and stated in the special finding, or the judgment must be for the defendant. *Kehr v. Hall, 405*
5. *Same.—Insufficient Complaint.*—Where the acts specially found relate to a paragraph of complaint which is bad, a judgment rendered thereon for the plaintiff will be reversed. *Ib.*

SPECIAL JUDGE.

See CHANGE OF JUDGE.

SPECIFIC PERFORMANCE.

See REAL ESTATE, 9 to 11.

STATE COMITY.

See DEPOSITION.

STATUTE.

See CONSTITUTIONAL LAW, 1, 2; DECEDENTS' ESTATES, 2; TAXES, 1.

STATUTE CONSTRUED.

See BICYCLE, 2; CHANGE OF JUDGE; COUNTY COMMISSIONERS; CRIMINAL LAW, 1, 2, 4, 13, 14, 20; DAMAGES; DECEDENTS' ESTATES, 16, 17; DESCENT; MANDAMUS; TAXES, 4, 6, 7; WILL, 1, 4.

STATUTE OF FRAUDS.

See CONTRACT, 6; PROMISSORY NOTE, 7; REAL ESTATE, 12.

STATUTE OF LIMITATIONS.

See MORTGAGE, 4; QUIETING TITLE, 2; TRUST AND TRUSTEE, 1.

1. *Quieting Title.*—An answer pleading the fifteen years statute of limitations in bar of a suit to quiet title to real estate is good.
Royce v. Turnbaugh, 539
2. *Same.—Coverture.—Infancy.*—A reply of coverture to an answer pleading the statute of limitations in bar of a suit to quiet title is bad; so is a reply of the plaintiff's infancy when the cause of action accrued marriage during non-age and continued coverture. *Ib.*
3. *Same.—Adverse Possession.*—Neither a suit to quiet title nor an action for partition can be maintained by plaintiffs, the youngest of whom is thirty-five years old, where it appears that the defendants and their grantors have been in the exclusive and continuous possession of the real estate for more than twenty years, under a claim of title, as in such case both proceedings are barred. *Ib.*
4. *Same.—Non-Residence of Plaintiff.—Running of Statute not Stayed.*—The running of the statute of limitations against a plaintiff is not stayed during the time he may be a non-resident of this State. *Ib.*

STREET IMPROVEMENT.

See VENDOR AND PURCHASER.

SUBROGATION.

See PRINCIPAL AND SURETY.

Mortgage.—Judgment.—Satisfaction.—False Representations.—Husband and Wife.

—Where a husband and wife execute a mortgage upon the former's real estate, which is subsequently conveyed to the wife, who dies shortly after a judgment of foreclosure is rendered, leaving her husband and children surviving her, one who, at the solicitation of the husband, and upon his representation that the title is in him, and without any actual notice to the contrary, pays the amount of the judgment rendered upon the mortgage and causes satisfaction to be entered, and takes from the husband a new note and mortgage for the amount so advanced, is entitled, upon ascertaining the facts, to have the satisfaction of the judgment set aside, and to be subrogated to all the rights of the prior mortgagee, without regard to the solvency or insolvency of the mortgagor. *Johnson v. Barrett, 551*

SUMMONS.

Non-Resident.—Attendance at Trial.—Service Upon.—A person who comes into this State for the purpose of testifying as a witness in an action in which he is a party, can not be legally served with a summons at the suit of the party plaintiff in the action he came here to defend. Section 312, R. S. 1881, does not apply to such a case. *Wilson v. Donaldson, 356*

SUPREME COURT.

See APPEAL; INSTRUCTIONS TO JURY, 3, 4; JURISDICTION, 2; PLEADING, 11; PRACTICE, 8; SPECIAL FINDING, 2, 5.

1. *Reversal of Judgment.—Failure of Proof.*—A judgment will be reversed where there is an entire failure of proof as to a fact essential to the support of the action. *Keiser v. Beam, 31*
2. *Bill of Exceptions.—Failure to State that it Contains all the Evidence.—Practice.*—Where a bill of exceptions does not contain the statement, "this is all the evidence given in the cause," or equivalent words, questions which depend upon the evidence will not be considered. *Mattinger v. Lake Shore, etc., R. W. Co., 136*
3. *Practice.—Rulings of Trial Court.—Presumptions in Favor of.*—All reasonable presumptions are indulged in favor of the regularity of the proceedings of the trial court. *New Albany, etc., R. W. Co. v. Day, 337, 599, 600*
4. *Same.—Questions Must be Properly Presented to Trial Court.*—Questions not properly presented to the trial court will not be considered on appeal. *Ib.*
5. *Failure of Evidence.—Reversal of Judgment.—Practice.*—A judgment will be reversed and a new trial granted if there is a failure of evidence upon any material point. *O'Donahue v. Creager, 372*
6. *Dismissal of Appeal.—Effect as to Assignment of Cross-Errors.*—The dismissal of an appeal by the appellant does not carry the case so far as it is affected by an assignment of cross-errors. *Feder v. Field, 386*
7. *Same.—Right to Assign Cross-Errors.*—The code makes no provision for the assignment of cross-errors by the appellee, but the practice has been so long recognized that it has become one of the unwritten rules of procedure. *Ib.*
8. *Same.—Consideration of Cross-Errors.*—While cross-errors may be assigned the court is not bound to consider them in every instance; but

where the entire record and all the parties are properly before the court, the appellee will be awarded affirmative relief if he is entitled to it. *Ib.*

9. *Same.—Notice.*—In the absence of a rule requiring it, the appellee, upon assigning cross-errors, is not bound to give notice to appellants who are active parties, but notice may be necessary as to persons who do not join in the appeal, or who are in court merely upon notice from the appellant. *Ib.*
10. *Assignment of Error.—Causes for New Trial.—Practice.*—Matters which are properly causes for a new trial, and which should be embraced in a motion therefor, can not be independently assigned as errors in the Supreme Court. *Queen Ins. Co. v. Studebaker Bros. Mfg. Co., 416*
11. *Form of Judgment.*—An objection to the form of a judgment can not be made for the first time in the Supreme Court. *Ib.*
12. *Weight of Evidence.*—A judgment will not be reversed on the mere weight of the evidence. *Ib.*
13. *Questions Upon Exclusion of Evidence.—Bill of Exceptions.—Practice.*—Where all the evidence is not in the record, a question relating to the exclusion of evidence will not be considered, unless some statement is embodied in the bill of exceptions showing that the evidence was excluded because deemed intrinsically incompetent. *Mercer v. Corbin, 450*
14. *Weight of Evidence.—Reversal of Judgment.—Practice.*—A judgment will not be reversed upon the mere weight of the evidence. *Rund v. Sprague, 456*
15. *Preponderance of Evidence.*—The Supreme Court will not weigh evidence for the purpose of determining the preponderance. *Isler v. Bland, 457*
16. *Same.—Evidence.—Support of Verdict.*—However much the evidence for the successful party may be contradicted, it will nevertheless, if it tends to support the verdict, be held sufficient on appeal, unless to believe it would involve an absurd or unreasonable conclusion. *Ib.*

SURETY.

See BOND; JUDGMENT, 1, 2; MORTGAGE, 8; PRINCIPAL AND SURETY; PROMISSORY NOTE, 7.

SWAMP LAND.

1. *Patent.—Custodian of Records.—Copies.—Evidence.*—Section 5628, R. 8. 1881, makes the auditor of state the custodian of swamp land records, and a copy of letters-patent, properly authenticated by him, is, under section 462, admissible in evidence. *Nitche v. Earle, 270*
2. *Same.—Presumption that Officer Does His Duty.*—Courts take knowledge that the secretary of state was required by statute to record letters-patent for swamp lands, and that the custody of such records was transferred from the secretary to the auditor of state, and, in the absence of a showing to the contrary, it will be presumed that patents were duly recorded, and that the records were turned over to the auditor. *Ib.*
3. *Same.—Designation and Certification of Records.—Evidence.*—The books in which the secretary of state recorded patents were not required to be designated on the outside as records of patents, nor was the secretary required to attach any certificate to the same, and evidence that a book from which a copy of a patent was made was lacking in these respects was properly excluded. *Ib.*
4. *Same.—Recording of Patent.*—Swamp land patents issued by the State are not required to be recorded in the county where the land is situated, but they are to be recorded in the office of the secretary of state,

and the title of the act providing for such record is broad enough to cover this provision. *Ib.*

TAXES.

See MORTGAGE, 8; PARTITION, 3.

1. *Board of Equalization.—Authority to Change Valuation of Individual Property.—Notice.—Unconstitutional Statute.*—The statute of this State assuming to confer authority upon the county board of equalization to conclusively change the valuation placed upon property by an individual taxpayer and to add property to his list, does not provide for notice, and is unconstitutional. *Kuntz v. Sumption, 1*
2. *Same.—Notice to Public not Notice to Individual.*—A general notice to the public, by publication or posting, of the time, place and purpose of the meeting of the board of equalization, is not such notice to an individual taxpayer as is required to authorize a change in the valuation of his property. *Ib.*
3. *Same.—Unauthorized Notice not Effective.*—The fact that the taxpayer actually has notice of the proceeding is not sufficient to authorize a disposition of his individual property rights, as notice must be given under a statute providing for it, or it will be unavailing. *Ib.*
4. *Wrongful Assessment.—Increase of Valuation by Auditor.—Refunding.*—A county auditor has no power to increase the valuation of lands for purposes of taxation as fixed by the assessor and the county board of equalization, and his action in doing so constitutes such a wrongful assessment, within the meaning of section 5813, R. S. 1881, as entitles a taxpayer to have the excess of taxes paid by him thereunder refunded. *Board, etc., v. Senn, 410*
5. *Same.—Valuation by Assessor and Board of Equalization Conclusive.*—The valuation placed upon lands by the assessor and the board of equalization, even if too small, is conclusive upon the auditor and all other persons, until changed in some manner expressly authorized by law. *Ib.*
6. *False List.—Omission of Property.—Penalty.*—One who fraudulently omits from the tax list returned by him money on deposit belonging to him, is liable to the pecuniary penalty prescribed by section 6339, R. S. 1881, which is recoverable in an action in the name of the State, on the relation of the prosecuting attorney. *Durham v. State, ex rel., 477*
7. *Same.—Separate Offences.—Criminal and Civil Liability of Taxpayer.*—The offences defined by sections 2150 and 6339, R. S. 1881, in relation to false returns of property for taxation, are separate and distinct, the one subjecting the taxpayer to criminal prosecution, and the other rendering him liable to a penalty recoverable in a civil action. *Ib.*
8. *Same.—Constitutional Law.*—The Constitution of this State, in speaking of criminal prosecutions, does not refer to the enforcement of statutory penalties. *Ib.*

TENDER.

See COSTS, 1, 3.

1. *Verdict.—Waiver.*—A plaintiff can not complain that a verdict in his favor is less than a sum tendered by the defendant, where he fails at the trial to introduce any evidence of the tender. *Spence v. Board, etc., 573*
2. *Same.—Instruction to Jury.*—A plaintiff can not complain of the failure of the court to instruct the jury to return a verdict in his favor for the amount of a tender which he contends was not well pleaded and of which no evidence was given to the jury. *Ib.*

TITLE.

See QUIETING TITLE; RAILROAD, 24, 25; REAL ESTATE; RECEIVER; SALE, 3 to 6; SCHOOL FUND MORTGAGE; SHERIFF'S SALE; STATUTE OF LIMITATIONS.

TORT.

See JURISDICTION, 3.

Action for.—Defence.—Set-Off.—Counter-Claim.—An independent tort can not be made a defence against another tort, either by way of set-off or counter-claim. *Keller v. B. F. Goodrich Co.*, 556

TOWNSHIP.

Highway.—Illegal Expenditures by Trustee.—Reimbursement of Township by County.—Action on Trustee's Bond.—Although the acts of a township trustee in laying out a highway and building a bridge thereon are negligent and illegal, yet if, after the work is done, the county commissioners donate funds from the county treasury which fully reimburse the township for all expenditures in opening the highway and building the bridge, no action can be maintained by the township on the trustee's bond. *State, ex rel., v. Vogel*, 183

TOWNSHIP TRUSTEE.

See TOWNSHIP.

TRADE-MARK.

1. *Infringement.—Injunction.*—A label containing the words "Non-Secret Dental Vulcanite, made according to our analysis of the Akron Dental Rubber"—the last three words being printed in a different colored ink from the rest of the label, with large type, and conspicuously displayed—is an infringement upon a trade-mark containing the words "The Akron Dental Rubber," and injunction will lie to prevent its use. *Keller v. B. F. Goodrich Co.*, 556
2. *Same.—Intent to Deceive.—Presumption.*—Where a trade-mark is used for the purpose of securing a benefit at the expense of its owner, and is not used in good faith for the purpose of explanation or information, the just presumption is that the person so using the trade-mark intends to deceive, and that he will probably succeed in his purpose, and the courts will restrain such use. *Ib.*
3. *Same.—Similitude in Substantial Parts.*—When the similitude is in the substantial parts of a trade-mark there is an infringement, and an evasive attempt to hide the similarity, or a colorable explanation, which appears to be made for the purpose of escaping the effect of a wrongful use of the trade-mark, will not defeat the owner's right to an injunction. *Ib.*
4. *Same.—Evidence.—Quality of Articles.*—In a contention as to the infringement of a trade-mark, evidence as to the quality of the articles manufactured by the respective parties is not material. *Ib.*

TRUST AND TRUSTEE.

See DECEDENTS' ESTATES, 8; FRAUDULENT CONVEYANCE, 1, 5; GUARDIAN AND WARD, 2; WILL, 8.

1. *Conversion.—Statute of Limitations.—Insufficient Answer.*—In an action against a trustee to compel an accounting and for judgment for trust funds converted, an answer setting up the statute of limitations in bar of the action and coupling with it a special denial of the defendant's trusteeship, in support of the plea of the statute, is bad. *Colglazier v. Colglazier*, 460
2. *Real Estate.—Guardian and Ward.*—Where a person purchases real estate, pays one-third of the purchase-money out of funds in his

hands as guardian, gives his individual notes secured by mortgage for the balance, and takes the title in his own name, a trust results in favor of the purchaser's wards as to one-third of the real estate, and no more. *Hughes v. White, 470*

3. *Same.*—*Change by Subsequent Transactions.*—A trust in real estate arises at the inception of the title, and depends upon the transaction as it occurred up to that time. It can not be changed by any subsequent transaction, except as such transaction may throw light upon the original. *Ib.*

VENDOR'S LIEN.

See SCHOOL FUND MORTGAGE.

VENDOR AND PURCHASER.

See DEED; EMBLEMENTS; FIXTURES; FRAUDULENT CONVEYANCE; REAL ESTATE.

Conveyance.—*Pending Proceedings to Condemn.*—*Grantee Entitled to Damages Awarded.*—*Parol Reservation.*—*Evidence.*—A purchaser, to whom city lots are conveyed by warranty deed while a proceeding to condemn a portion thereof for street purposes is pending, is entitled to recover from the grantor any damages that may be awarded in the latter's name and paid to him by the city by reason of the condemnation, and the grantor will not be permitted to prove by parol that he reserved the damages at a date prior to the execution of the deed. *Bailey v. Briant, 362*

VENUE.

See ASSAULT AND BATTERY, 1; PLEADING, 7.

VERDICT.

See PRACTICE, 7; SUPREME COURT, 16; TENDER.

1. *General and Special.*—*Reconciliation.*—If there is any reasonable hypothesis on which the general verdict and a special finding can be reconciled, judgment must follow the general verdict. *Grand Rapids, etc., R. R. Co. v. Ellison, 234*
2. *When Court May Direct.*—If the plaintiff's evidence, with all the legitimate inferences which a jury might reasonably draw from it, is insufficient to sustain a verdict in his favor, so that the same, if returned, would have to be set aside, the court may properly direct a verdict for the defendant, without submitting the evidence to the jury; otherwise not. *Wolfe v. McMillan, 537*

VERIFICATION OF PLEADING.

See REPLEVIN, 3.

VESTED RIGHT.

See BENEFIT SOCIETY, 5.

VOLUNTARY ASSIGNMENT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS; REPLEVIN, 1; SALE, 5.

VOLUNTARY ASSOCIATION.

See BENEFIT SOCIETY.

WAGERING CONTRACT.

See CONTRACT, 3, 4; PROMISSORY NOTE, 1 to 4; SALE, 1, 2.

WAIVER.

See CRIMINAL LAW, 7; JURISDICTION, 2; LIFE INSURANCE; PRACTICE, 10; TENDER.

WARDEN STATE PRISON.

See MANDAMUS.

WIDOW.

See DECEDENTS' ESTATES, 10 to 12; DEED, 4, 5.

WILL.

See DEED, 2; REAL ESTATE, 1 to 7.

1. *Revocation.—Contest After Probate.—Bond.*—Where, after a will has been admitted to probate, a verified complaint is filed, alleging that the will had been revoked by the execution of a later will and that its admission to probate was unlawful, and praying that the probate thereof be annulled and the later will admitted to probate, such proceeding is, in legal effect, an application to contest the will, within the meaning of section 2597, R. S. 1881, and can not be maintained unless a bond is filed as required by that section. *Burns v. Travis, 44*
2. *Same.—Estoppel.*—The probate of a former will can not be pleaded in estoppel of an application to admit a later will to probate, unless the applicant has had such a connection with the former will, or the probate proceedings upon it, as to estop him from denying its validity. *Ib.*
3. *Same.—Effect of Probate.*—The *ex parte* probate of a will ascertains nothing but the *prima facie* validity of the instrument, and that it is seemingly what it purports to be on its face. *Ib.*
4. *Same.—Revocation.*—If a will, duly subscribed and attested, expressly revokes all prior wills executed by the testator, it is valid for that purpose, under section 2559, R. S. 1881, whether it is effectual as a testamentary disposition of property or not. *Ib.*
5. *Same.—Joinder of Causes.*—It is proper to join with an application for the admission of a later will to probate, a demand that the probate of a former will be set aside. *Ib.*
6. *Term "Legal Heirs."—When Construed to Mean "Child or Children."*—The term "legal heirs" will be construed to mean "child or children" when it clearly appears from the will that the testator used it in that sense. *Underwood v. Robbins, 308*
7. *Same.—Will Construed.—Descent.—Kin of the Half-Blood.*—A testator bequeathed to his daughter a sum of money, directing that it be put at interest and the principal paid to her when she became twenty-one years of age, or the day of her marriage; "but if she should die without legal heirs, or before she reaches twenty-one years, her share of my estate shall be given by my executor to my mother, brothers and sisters, or their representatives, share and share alike."
Held, that the term "legal heirs" was used in its limited sense of "child or children," and upon the death of the legatee, an infant and unmarried, after the death of the testator's mother, brothers and sisters, the children of the latter are entitled to the estate to the exclusion of the legatee's brother and sister of the half-blood. *Ib.*
8. *Implied Trust.—Illegitimate Children.*—Where property is devised to a wife "to use and dispose of as she may think best for herself and my children," she takes it charged with an implied trust for the use of herself and the testator's children; and the word "children" will be held to mean the testator's illegitimate children by the devisee, to the exclusion of his legitimate children by a former wife, when the circumstances show such to have been his intention. *Elliott v. Elliott, 380*

WITNESS.

See CRIMINAL LAW, 7 to 9; DEPOSITION; NON-RESIDENT; SUMMONS.

Examination of.—Leading Questions.—Unless it appears that the trial court abused its discretion in allowing leading questions to be put to a witness, a judgment will not be reversed on that account.

Goudy v. Werbe, 154

WORDS AND PHRASES.

BICYCLE, 2; DAMAGES; SUPREME COURT, 2; WILL, 6 to 8.

WRITS AND PROCESS.

See MANDAMUS; SUMMONS.

END OF VOLUME 117.

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